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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

UNITED STATES OF AMERICA, ex rel. WILLIAM JEFFREY GILLIAM

Petitioners,

v.

GENERAL DYNAMICS CORPORATION

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether entities subject to the provisions of the False Claims Act, 31 U.S.C. 3729 and 3730, are entitled to *Noerr-Pennington* First Amendment immunity when they choose to provide false and misleading testimony to the U.S. Congress.
2. Whether the Fourth Circuit's decision affirming the district court's grant of summary judgment represents an important conflict within the circuits on the issue of *Noerr-Pennington* First Amendment immunity, so as to call for the exercise of this Court's supervisory powers.
3. Whether the Fourth Circuit's decision affirming the district court's grant of summary judgment represents an important conflict within the circuits and within the Fourth Circuit, from the opinion of a different Fourth Circuit panel in *Newport News Shipbuilding v. General Dynamics Corporation,* 960 F.2d 386 (4th Cir. 1992) calling for the exercise of this Court's supervisory powers.
4. Whether the decision below rejecting false certification liability under the False Claims Act, 31 U.S.C. § 3729 *et seq.* represents an important

split of authority within the Circuits calling for the exercise of this Court's supervisory powers.

LIST OF PARTIES

United States of America, *ex rel.* William Jeffrey Gilliam

General Dynamics Corporation

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PETITION FOR WRIT OF CERTIORARI

Petitioner and relator William Jeffrey Gilliam, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on July 21, 2004, and the order denying petition for rehearing and rehearing *en banc* entered on September 8, 2004.

OPINIONS BELOW

United States ex rel. William J. Gilliam v. General Dynamics Corporation, civil action no. 01-3023 U.S. District Court, District of S.C., 11/7/2001 Order denying defendant's motion to dismiss, reprinted at App. 1.

United States ex rel. William J. Gilliam v. General Dynamics Corporation, civil action no. 01-3023 U.S. District Court, District of S.C., 10/15/2002 Order granting defendant's motion for summary judgment, reprinted at App. 10.

United States ex rel. William J. Gilliam v. General Dynamics Corporation, civil action no. 01-3023 U.S. District Court, District of S.C. 7/21/2003 Order denying plaintiff's motion to alter or amend judgment.

United States ex rel. William J. Gilliam v. General Dynamics Corporation, appeal no. 03-1912 U.S. Court of Appeals, Fourth Circuit, 7/21/2004 Order affirming summary judgment, reprinted at App. 13.

United States ex rel. William J. Gilliam v. General Dynamics Corporation, appeal no. 03-1912 U.S. Court of Appeals, Fourth Circuit, 9/8/2004 Order denying appellant's request for rehearing and rehearing *en banc,*

JURISDICTIONAL STATEMENT

The final judgment of the court of appeals was entered on September 8, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

2 U.S.C. § 192, reprinted at App. 17

10 U.S.C § 2305, reprinted at App. 17

18 U.S.C. § 1001, reprinted at App. 28

18 U.S.C. § 1003, reprinted at App. 29

31 U.S.C. §3729, reprinted at App. 30

31 U.S.C. § 3130, reprinted at App. 32

STATEMENT OF THE CASE

HISTORY OF PROCEEDINGS

Petitioner filed the original complaint on May 7, 1999 in the U.S. Bankruptcy Court for the District of South Carolina, case no. 96-76468-B, adversary no. 99-80152. The complaint alleged violations of 31 U.S.C. § 3729 *et seq.* The complaint was filed under seal and in December 2000 the United States declined to intervene and the defendant was served with a copy of the summons and complaint.

Defendant General Dynamics Corporation moved to withdraw reference to the United States District Court for the District of South Carolina. The defendant also filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b). On October 2, 2001 the district court granted the motion to withdraw reference, and on October 24, 2001 the district court conducted a hearing on the defendant's motion to dismiss.

On November 7, 2001 District Court Judge David Norton issued an order denying defendant's motion to

dismiss and issuing an order directing the parties to conduct limited discovery on the issue of materiality and submit motions for summary judgment by March 15, 2002.

On December 18, 2001 the case was reassigned to District Court Judge Patrick Michael Duffy. On February 12, 2002 petitioner filed an affidavit and request for entry of default citing defendant's failure to answer the complaint. Default was entered on February 12, 2002.

On March 11, 2002 the case was reassigned to District Court Judge C. Weston Houck.

On April 10, 2002 defendant's motion for relief from default was granted.

On September 20, 2002 petitioner filed a motion to compel discovery and on September 25, 2002 the district court granted the motion to compel.

On October 15, 2002 the district court granted defendant's motion for summary judgment finding that the defendant did not make false statements to the United States and that the statements at issue were not material.

On October 28, 2002 petitioner filed a motion to alter or amend judgment and on June 19, 2003 the district court heard and denied petitioner's motion to alter or amend judgment.

On July 21, 2003 petitioner filed a notice of appeal.

On May 7, 2004 the court of appeals heard oral arguments from petitioner and defendant and on July 12, 2004 the court of appeals issued an order confirming the district court's grant of summary judgment in favor of defendant.

On July 26, 2004 petitioner filed a request for rehearing and rehearing *en banc*. On September 8, 2004 the court of appeals denied petitioner's request for rehearing *en banc*.

SUMMARY OF FACTS

Introduction

Prior to the election of Ronald Reagan, General Dynamics Corporation and other suppliers of ships to the

U.S. Navy maintained substantial commercial shipbuilding businesses. In 1981 the new administration announced plans to build a 600-ship Navy. Most defense contractors elected to abandon commercial shipbuilding in favor of Navy shipbuilding.

At the end of the Cold War General Dynamics Corporation ("GD") began an aggressive effort to re-establish commercial shipbuilding in order to ameliorate the effect of rapid cancellation of Navy submarine contracts. GD's December 1992 Report to Shareholders on Form 10-K claimed sufficient shipbuilding business to sustain GD's manufacturing facilities thru the end of the decade. GD claimed that its forecasts included both government and non-government revenue. GD's internal forecasts $1.5 billion of commercial sales by 1998 were disclosed to the petitioner by James Turner, petitioner's cousin and GD's President.

In September 1992 GD was asked by the DOD to forecast its shipyard utilization so that the DOD could assess the viability of the defense industrial base. GD informed the DOD that sales of its Electric Boat Division would decline from $1.5 billion in 1992 to $665 million by 1998; less than sufficient to sustain shipyard viability. On the basis of this statement, in October 1993 the DOD determined that it would recommend awarding GD a no-bid contract to construct a third *Seawolf* class submarine. The award was characterized by the DOD as the most cost effective method of ensuring the survival of GD's submarine manufacturing capability.

Petitioner's False Claims Act complaint alleges that either GD's statements to shareholders, in the 1992 GD Report on Form 10-K were false and fraudulent, or its disclosures to the DOD in September 1992 were false and fraudulent. If the statements to the DOD were false and fraudulent, then GD violated the False Claims Act by making false statements to the U.S. to obtain a contract.

If the statements to shareholders and to the SEC were false and fraudulent, then GD likewise violated the False Claims Act by falsely certifying compliance with federal

statutes, in this case the federal securities laws, in order to induce the government to award GD the *Seawolf* contract.

The Award of a Third *Seawolf* Submarine to GD

At the end of the Cold War General Dynamics Corporation ("GD") was faced with the cancellation of an entire class of nuclear submarines, the so-called *Seawolf* class of nuclear attack submarines. GD formed Marine Energy Systems Corporation ("MESC") in order to pursue commercial activities as a replacement for and supplement to anticipated cuts in defense spending.

GD informed shareholders that MESC and its other commercial businesses would 'bridge' an anticipated manufacturing gap between the end of construction of existing submarine orders and the construction of a new class of submarines then forecast to begin in 1998. GD's assurances were set forth in the Management Discussion & Analysis section of GD's Report to shareholders on Form 10-K for 1992 stating "the company expects that future awards, under the *Seawolf* program and other related government and **non-government** businesses, will utilize the company's production facilities until (year 2000)(emphasis added)." GD justified this forecast in substantial part on its internal forecast of $1.5 billion in MESC revenues by 1998. GD described its commercial businesses as being compatible with its existing submarine manufacturing, and while GD stated that these businesses were not replacements for continued submarine manufacturing, GD claimed that commercial manufacturing would assist it in maintaining affordable, competitive submarine shipbuilding skills.

At the same time that GD was informing its public shareholders and the U.S. Securities and Exchange Commission ("SEC") of its positive forecast of future business it was informing the United States Department of Defense (in September 1992) that it forecast sales of EB declining from a 1992 total of approximately $1.5 billion to approximately $665 million in 1998. In making this representation to the United States GD affirmatively

represented that it was including forecasts for MESC and all of its commercial businesses in the figures submitted to the United States.

GD also informed the United States that a sales level of $655 million was insufficient to maintain its shipyard operations. Relying on these representations, in late 1993 the United States Department of Defense announced that it intended to seek funding from the Congress for an additional *Seawolf* submarine contract, to be awarded to GD, and that this authorization would include an authorization to "sole source" the submarine from GD. The DOD stated at the time of this announcement that the third *Seawolf* submarine was not justified based on defense needs but was justified in order to ensure GD's survival as a builder of submarines.

When GD learned that the DOD intended to recommend awarding GD a no-bid contract for a third *Seawolf* submarine, GD understood that it needed to immediately address the dilemma caused by the conflict between the forecasts that it had supplied to the United States Department of Defense (1992-1998 EB sales decreasing from $1.5 million to $665 million) as contrasted with the forecasts supplied to shareholders and the SEC (1992-1998 EB sales increasing from $1.5 billion to almost $2 billion). The DOD decision was announced in October 1993 and in December 1993, GD announced that it intended to terminate or dispose of all of its commercial businesses. GD's 1993 Report to Shareholders on Form 10-K reveals GD's changed outlook for its submarine manufacturing business, stating "unless the company is awarded a third *Seawolf* construction contract and other related government business, the current backlog is insufficient to sustain operations until (2000)."

Contrasting GD's 1992 and 1993 Reports to Shareholders on Form 10-K shows that GD claimed that it could sustain shipyard operations in 1992 when it still retained its commercial businesses. In 1993, without these businesses GD expressly states that only a third *Seawolf* will enable GD to sustain its shipyard operations thru the end of the decade.

GD's Historical Relationship with its Principal Customer

The United States Department of Defense has long been GD's primary customer. GD has a long history of abusing its relationship with its primary customer.

In 1976 GD filed a claim against the Navy for $544 million in "Navy caused" cost overruns. In 1978 GD increased their claim to $643 million. The DOJ accused GD of making artificially low bids to justify "cost overruns."

In 1984 former GD President P. Takis Veliotis provided testimony to a Senate Committee that traveled to Greece in order to obtain Veliotis' testimony. With the use of Veliotis' testimony Senate and House Subcommittee Hearings produced testimony and evidence, including GD documents, showing that "Navy officials collaborated with the contractor to jointly contrive an explanation for the settlement that would be approved by Congress." *A Billion Dollar Boondoggle,* by John Riley, quoting from *Report of Joint Economic Committee Report,* Senator William Proxmire. The Riley book chronicles GD's recent history of malfeasance, including the existence, in 1986, of at three ongoing federal grand jury investigations and 15 DOD investigations, all alleging misconduct by GD and its senior executives.

In 1986 Michael Barrett, Chief Counsel and Staff Director, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives, authored a paper entitled *Congressional Oversight: the SEC and the Accounting Profession.* Barrett's paper begins by stating:

> "Financial reporting by defense contractors is essentially manipulative...General Dynamics...is a good example of some of the problems with financial reporting in the defense industry. Takis Veliotis (former GD President) who fled to Greece to escape prosecution...produced essentially three sets of corporate records that he had placed in safekeeping for just such an eventuality. The first set was the

> usual SEC-type of information, and the second set was the data GD supplied to the Navy showing stages of completion for submarines, including dates of completion and the hours of labor being expended. However, the third set was the most interesting. That set, for the company's **internal use**, showed what the corporate executives projected the second set should actually look like....Veliotis produced evidence strongly supporting his allegation that the company (manipulated its stock price)...when the Subcommittee sent GAO auditors to GD...the company demonstrated its complete cooperation...by turning off the heat...I received a call from one auditor who lamented that his ballpoint pen would not write at 35 degrees. Other similarly harassing tactics dogged those auditors during the course of their work for the Subcommittee (emphasis added)." *Barrett Paper*, p.3-4.

Just prior to his retirement as the head of the Navy's nuclear program, former Admiral Hyman Rickover accused GD of trying to "cheat" the Navy. GD responded by accusing Rickover of accepting $67,000.00 of gifts from GD during his career. When asked by reporter Diane Sawyer why GD would accuse the Admiral of accepting gratuities, Rickover stated "I accused them of false claims."

In recent filings in the *MESC v. GD* adversary proceeding in the South Carolina bankruptcy court GD described the petitioner as "a man who, after his business empire collapsed, became a serial-litigant intent on recovering his lost fortune by suing everyone with whom he came in contact." GD Mtn. SJ 10/13/04 no. 98-80220.

GD's appellee brief below referred to petitioner's allegation that GD "kept two sets of books," referring to the discrepancy in GD's disclosures of commercial sales forecasts to the SEC and to the DOD. GD argued "simply put, GD did not have 'two sets of books,' Gilliam's catch phrase in the district court." GD App. B. p.25.

GD continues to hire retired Admirals and Generals as corporate employees and as outside directors.

Petitioner's Purchase of MESC from GD

GD's December 1993 decision to sell MESC resulted in the June 1994 signing of an Asset Purchase Agreement with the petitioner. At the time of the signing of the agreement the petitioner and James Turner (then President of GD's Electric Boat Division and later President of GD) met and discussed Turner's outlook on MESC's business. Turner described his disagreement with the decision made by GD management to divest MESC and GD's other commercial businesses. Since Turner and petitioner are second cousins, their discussions were both personal and candid. Turner stated that he believed that GD's commercial businesses would achieve in excess of $1.5 billion in sales prior to the year 2000.

GD employees informed the petitioner that MESC had proprietary technology, a substantial backlog of expected sales, and an important joint venture partnership with Westinghouse Electric Corporation. In addition to the Asset Purchase Agreement, GD signed a 5 year Technical Support Agreement with MESC, thereby allowing MESC the ability to use GD engineers to run the proprietary software that MESC was acquiring for purposes of designing and building its products.

Just prior to James Turner's May 1995 U.S. Senate testimony MESC signed a $450 million commercial contract. This contract was consistent with GD's December 1992 commercial business disclosures to shareholders and the SEC, but inconsistent with GD's September 1992 commercial business disclosures to the DOD (the DOD forecasts predicted less than $15 million of commercial revenues and MESC had just signed a $450 million contract).

MESC completed its contract work by utilizing its Technical Support Agreement with GD. In 1997 MESC filed a bankruptcy petition when it was unable to obtain payments for work on its contract. When MESC filed its bankruptcy petition GD filed a proof of claim as a creditor for less than $20,000.00 in unpaid engineering fees.

In 1998, following the expiration of the 5 year Technical Support Agreement, GD claimed that MESC had not acquired the software necessary to design and build its commercial products. The MESC chapter 7 trustee and the petitioner are presently cooperating in a fraud and breach of contract action against GD. In discovery the MESC chapter 7 trustee has obtained the testimony of several former MESC and GD employees including GD's former president of MESC. The testimony of these individuals includes admissions that none of the sales and marketing forecasts provided to the petitioner accurately reflected MESC's financial condition. The testimony also includes admissions that GD never intended to deliver the software needed by MESC to design and build its product lines.

In the case of MESC's $450 million project, once MESC completed the design of the project (a barge mounted power plant) MESC was not paid for its work and other project participants including Westinghouse Electric Corporation actively worked to exclude first the petitioner and later on MESC from the project.

Westinghouse Electric Corporation served as a subcontractor to GD on the third *Seawolf* contract, supplying the nuclear reactor for the submarine. Westinghouse obtained copies of all of the design details prepared by MESC and supplied them to a Malaysian shipyard that then completed construction of the MESC designed power barges. MESC received no consideration for this technology theft.

These power barges were ultimately deployed in Nigeria and were the barges involved in the Enron *et al* Nigeria power barge criminal proceedings recently concluded by the U.S. Department of Justice and resulted in the conviction of the participating individuals.

Commencement of the False Claims Act Civil Action

When it became clear that GD's refusal to provide MESC with the design software needed to design and manufacture its product line was against GD's financial

interest, the petitioner began to study and inquire into explanations for GD's actions. These investigations revealed the fact that GD had taken several extraordinary steps as it prepared to obtain an award of a third *Seawolf*. GD purged its board of directors of all outsider directors that were not either family members or retired Admirals or Generals. GD hired and promoted a partner from its long time principal outside counsel to both GD and the Crown family insiders, eventually appointing this individual CEO of GD. GD sold its space systems, Cessna aircraft and F-16 businesses and paid a substantial, one-time cash dividend to shareholders consisting of the proceeds of the sale of these businesses.

The petitioner obtained a copy of the proceedings 1995 Senate Hearings. In May 1995 the Senate Armed Services committee conducted hearings into the DOD's request for funding of its BUR recommendation for awarding GD a no-bid contract to construct a third *Seawolf* submarine. Both GD and the Navy described an extensive series of alternatives to maintain two nuclear capable manufacturers of submarines. These considerations included awarding GD submarine maintenance and overhaul work as well as other alternatives to the award of a new submarine manufacturing contract. However, all of the alternatives were measured against GD's shipyard forecasts as submitted to the DOD in September 1992 and not against a GD that was maintaining $1.5 billion of commercial work that GD characterized as being compatible with maintaining submarine shipbuilding skills.

Since the September 1992 forecasts included forecasts for their commercial businesses but nonetheless forecast virtually no results from their commercial sales efforts, the Navy and GD were able to justify the BUR recommendation. James Turner testified for GD. Turner failed to inform the Senate that GD's September 1992 commercial business disclosures to the DOD were inconsistent with GD's December 1992 commercial business disclosures to shareholders and the SEC.

It was immediately apparent to the petitioner that James Turner's statements and testimony to the U.S.

Senate totally contradicted Turner's statements of June 1994 to the petitioner concerning the viability of GD's commercial businesses. Taking actions to ensure the failure of MESC and MESC's $450 million power barge project was essential to GD in light of the Senate Hearings in May and June of 1995 and the successful vote to fund the third *Seawolf* in December 1995.

On the basis of this analysis, the petitioner and counsel prepared petitioner's Material Disclosure Statement and submitted this statement to the U.S. Department of Justice. Shortly thereafter the summons and complaint were filed under seal.

Summary Judgment in Favor of GD

Both the district court and the court of appeals erroneously assumed that since GD "disclosed" its decision to divest its commercial businesses in December 1993, GD's statements to the U.S. Senate in May 1995 were not "false statements," and since the Navy stated that it would have awarded GD the third *Seawolf* irrespective of available commercial work, any false statements about commercial work were not "material."

Both tribunals below failed to consider the undisputed fact that petitioner's allegation of false statements concerned the inconsistencies inherent in GD's statements to the DOD in September 1992 and to shareholders and the SEC in December 1992.

GD's December 1993 "disclosure" of its unsuccessful efforts to establish commercial sales does not overcome the inconsistent disclosures of these efforts to the United States and to shareholders and the SEC in 1992.

As described above in the procedural summary, GD did not comply with petitioner's discovery requests, necessitating an order to compel issued by the district court on September 25, 2002. Despite the granting of this motion to compel, petitioner was never provided with the accountants work papers showing consolidating and consolidated sales forecasts for GD's shipyard operations

justifying the statements set forth in GD's Management Discussion and Analysis for fiscal years 1992 and 1993.

REASONS FOR GRANTING THE WRIT

I. ENTITIES SUBJECT TO THE PROVISIONS OF THE FALSE CLAIMS ACT DO NOT HAVE FIRST AMENDMENT IMMUNITY WHEN THEY CHOOSE TO PROVIDE FALSE AND MISLEADING TESTIMONY TO THE U.S. CONGRESS

A. James Turner's Statement to the Petitioner were True for Purposes of Summary Judgment

Although the district court and court of appeals agreed that the record must be construed in the light most favorable to petitioner, the court of appeals referred to the statements of former GD President James Turner in testimony before the United States Senate as "evidence taken out of context." In fact, since both the district court and the court of appeals have affirmed summary judgment in favor of GD, the only context in which James Turner's statements are relevant and in context is the contrast in James Turner's statements to the Senate and those he made the year prior to his Senate testimony to the petitioner.

Petitioner's Material Disclosure Statement, as filed with the original summons and complaint, described petitioner's conversations with James Turner. As described to the petitioner, Turner vigorously disagreed with GD's decision to divest its commercial businesses because Turner believed that GD's commercial businesses were essential to the long term success of GD as a submarine manufacturer, and because, contrary to what GD told the Navy in September 1992 (and Turner subsequently told the Congress) Turner believed that prior to the year 2000, EB's commercial businesses would achieve sales greater than EB's submarine sales.

Since both the district court and the court of appeals have upheld summary judgment, there are no disputed

facts in the record. Additionally, summary judgment required both the district court and the court of appeals to view the evidence of Turner's statements to petitioner in the light most favorable to the petitioner.

Since, therefore, Turner's statements to the petitioner were true for purposes of upholding summary judgment; Turner provided false testimony to the U.S. Senate. GD's arguments below; that Turner's statements are "opinion testimony" and therefore protected by the First Amendment does not alter the fact that GD's has acknowledged that James Turner presented GD's "party line," and not his opinions, in testimony to the United States Senate.

The district court and the court of appeals erroneously viewed James Turner's May 1995 statements as being truthful, since GD had informed the DOD in December 1993 of the decision to exit commercial businesses. However, Turner was testifying about the justification of the BUR recommendation that was based on GD September 1992 disclosures. Since GD had commercial opportunities in September 1992 and since these opportunities were not disclosed to the DOD in the same fashion as they were disclosed to shareholders and the SEC, both tribunals below erroneously assumed that Turner was testifying about a different time frame.

James Turner informed the Senate that GD had considered each and every alternative to the DOD recommendation to purchase an unneeded submarine from GD and that the DOD recommendation was the most cost effective alternative available to the United States. When asked what GD would do with its submarine shipbuilding facilities if the Senate did not fund the unneeded submarine in the upcoming fiscal year 1996 budget Turner replied "shut it down, walk away, because we would not have anything to do." In contrast, almost precisely one year earlier, in June 1994 Turner informed petitioner that GD shipyards would have approximately $1.5 billion in commercial revenues by 1998 if the commercial businesses were retained.

When viewed in the context of GD's statements to the DOD (in September 1992) and to its shareholders (in their

1992 10K) Turner's statements to the Senate agree with GD's statements to the DOD. Turner's statements to petitioner agree with GD's statements to shareholders in the 1992 10K. However, since Turner's statements to the Senate are inconsistent with those made to the petitioner, the statements to the Senate were false and misleading. These false statements clearly meet the definition of materiality as set forth in *Harrison v. Westinghouse Savannah River Co.* 176 F.3d 776 (4th Cir. 1999) and in *United States ex rel. Berge v. Board of Trustees of the University of Alabama,* 104 F.3d 1453 (4th Cir. 1997).

B. The Fourth Circuit's Decision Upholding Summary Judgment Implies a First Amendment Immunity for False Statements Made to the U.S. Congress

Addressing the issue of Turner's false and misleading statements to the U.S. Senate, therefore, GD argued to both the district court and on appeal that Turner's statements to the Senate if untrue, were "opinions," not given under oath, and protected by the First Amendment from False Claims Act liability. GD justified this assertion of First Amendment privilege citing *IGEN Int'l., Inc. v. Roche Diagnostics GMBH,* 335 F.3d 303 (4th Cir. 2003). GD claims that *IGEN* justifies application of the *Noerr-Pennington* doctrine to those who engage in petitioning activity.

The *Noerr-Pennington* doctrine does grant First Amendment immunity to those engaged in petitioning activity. In *E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc.,* 365 U.S. 127(1961) this Court held that the Sherman Act did not prohibit two or more persons from associating together in an attempt to petition the government for changes in laws. In *UMW v. Pennington et al.,* 381 U.S. 637 (1965) this Court amplified *Noerr*, holding concerted efforts to influence public officials as not violating anti-trust laws even thought intended to eliminate competition.

GD' claims immunity to make false and misleading statements under this Court's *Noerr-Pennington* line of cases. This claim is unfounded. In *Noerr,* in *Pennington*

and in *IGEN* a party litigant sought immunity for civil litigation activities, not testimony to the U.S. Congress. GD chose to make false and misleading statements to the DOD in its September 1993 response to the BUR. As a direct result of GD's claim that it could not sustain its shipyard operations without a subsidy the DOD recommended building a submarine that was not within the DOD's force requirements and awarding this submarine to GD on a no-bid basis. Before the DOD could obtain funding for this submarine, Congress needed to appropriate the necessary funds. Prior to any vote on a matter as controversial as a no-bid award of an unneeded submarine the Senate held hearings and inquired into the reasonableness of the BUR. GD was summoned by the Senate to provide testimony to an investigative committee of the Senate. Therefore, GD was not "petitioning" the government; GD was offering testimony at a legislative hearing.

In *Watkins v. United States,* 354 U.S. 178, 187 (1957) this Court affirmed the broad investigative powers of the Congress in holding "it (the investigative power) encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency and waste."

Congress can enforce its broad investigative function either with Congress' common law power of contempt or thru the statutory provisions of 2 U.S.C. § 192.

Additionally, any assertion of a *Noerr-Pennington* based First Amendment immunity to offer false and misleading testimony to the Congress is inconsistent with this Court's holdings in *California Motor Transport Co. et al. v. Trucking Unlimited et al.*, 404 U.S. 513 (1972). In *California Motor Transport* this Court held "it is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *California Motor Transport* at 514. In order for GD to assert a *Noerr-*

Pennington right immunizing Turner's false and misleading statements, the asserted *Noerr-Pennington* immunity would override 31 U.S.C. §§ 3129 and 3130. As set forth by this Court in *California Motor Transport*, there is such no First Amendment immunity under *Noerr-Pennington.*

The district court's grant of summary judgment, as affirmed by the court of appeals, establishes a *Noerr-Pennington* right to make false and misleading statements to an investigative committee of the U.S. Senate. Not only does this decision represent a significant departure from this Court's decision in *California Motor Transport*, the decision below conflicts with federal penal code, which, at 18 U.S.C. §§ 1001 and 1003 prohibit making false or misleading statements on any matter within the jurisdiction of the executive, legislative or judicial branch of the United States Government.

In *John Bruce Hubbard v. United States,* 514 U.S. 695 (1995) this Court reversed in part its former holding in *United States v. Bramblett,* 348 U.S. 503 (1955). In *Hubbard* this Court affirmed the view that there is no judicial functions exception to 18 U.S.C. § 1001 stating "Congress could not have intended to leave frauds such as Bramblett's without penalty." *Hubbard* at 702.

C. Since There is no *Noerr-Pennington* First Amendment Privilege to Mislead the Congress This Court Should Exercise its Supervisory Powers and Grant Certiorari

The 1986 Amendments to the False Claims Act were intended to strengthen the Act and provide further oversight over frauds against the federal fisc. Here, a powerful defense contractor has succeeded in creating First Amendment immunity under the False Claims Act to provide "opinion testimony" to Congress during hearings conducted by the Congress prior to approving weapons expenditures of interest to the "opinion givers."

This Court should grant Certiorari in order to correct decisions below that are inconsistent with this Court's *Noerr-Pennington* line of cases and inconsistent with the

Congressional intent of the 1986 Amendments to the False Claims Act.

II. THE DECISIONS BELOW REPRESENT IMPORTANT CONFLICTS WITHIN THE CIRCUITS AS WELL AS WITHIN THE FOURTH CIRCUIT

A. In *Newport News* the Fourth Circuit Overturned the District Court's Finding that the Navy's 1991 Decision to Avoid Spending $73 Million to Maintain Two Submarine Shipyards was "Reluctant and Rational"

The first *Seawolf* submarine was designed by Newport News Shipbuilding ("NNS") as a result of a competitive award of the design contract. GD and NNS then competed to build the initial vessel in a class that was contemplated to eventually include 30 *Seawolf* class submarines. GD successfully bid $726 million and was awarded a contract to build the first *Seawolf*.

In 1991 Congress passed a Defense Appropriations Act, 10 U.S.C. § 2305. In doing so Congress provided the DOD with directives regarding the inclusion of "industrial mobilization" considerations in procurement decisions. The Congress provided considerable authority to the Executive to make and formulate plans for emergency mobilization. See 10 U.S.C. § 4501. The statute and regulation further require the establishment of an approved acquisition strategy for weapons systems involving multiple awards and limiting awards to those that conform to the approved strategy.

The Navy established a *Seawolf* acquisition strategy in 1988 that emphasized the importance of maintaining two nuclear capable shipyards for submarine constriction. Prior to the 1991 enactment of the revised Defense Appropriations Act, Congress enacted the 1991 Defense Authorization Act, Pub.L.No. 101-510, 104 Stat. 1498 (1990). This Act authorized the expenditure of $2 billion on the *Seawolf* program. The House Armed Services Committee Report stated "the Committee expects that the

Navy will proceed with its plan to bring the second submarine builder into the SSN-21 program." H.R. No. 101-665, 101st Cong., 2d Sess. 70 (1990). The Senate Armed Services Committee stated "The Committee believes that competition between two yards in the construction of nuclear-powered attack submarines is important to the Nation and should not be given up absent a clear showing that such action is in the long-term best interests of the United States." S.Rep. No. 101-384, 101st Cong., 2d Sess. 61-62 (1990).

On November 9, 1990 the Navy established an acquisition strategy as required by 10 U.S.C. § 2305. The strategy called for consideration of industrial mobilization. On January 8, 1991 GD and NNS submitted bids of $615 (GD) and $688 (NNS), compared with GD's winning bid of $726 on the first *Seawolf*. Because of GD's ability to avoid one time "start-up" costs in building the second *Seawolf*, any NNS bid below the $726 GD bid on the first *Seawolf* would have justified an industrial mobilization award to NNS. However, the Navy awarded the second *Seawolf* to GD based solely on price.

This decision was challenged by NNS, and on July 31, 1991 the U.S. District Court for the Eastern District of Virginia issued an order enjoining the Navy's award of the second *Seawolf* to GD. *Newport News and Shipbuilding and Drydock Company v. U.S. Navy et al*, 771 F.Supp. 739 (E.D. Va. 1991). The district court concluded that the Navy had failed to follow its acquisition strategy. The district court also held that it was an undisputed fact "that the award of the SSN-22 to Electric Boat effectively foreclosed future competitiveness. In fact, the Government proffered a great deal of evidence to the effect that industrial mobilization now meant a sole source." *Newport News* at 747.

On March 16, 1992 the Fourth Circuit reversed the district court's injunction. *Newport News Shipbuilding and Drydock Company v. U.S. Navy et al.*, 960 F.2d 386 (4th Cir. 1992). The Fourth Circuit followed the reasoning of decisions reached by Courts of Appeal in the First and D.C. Circuits in stating "a disappointed bidder bears a heavy

burden of establishing in court that 'the decision by a government agency either had no rational basis or involved a clear and prejudicial violation of applicable statutes or regulations.'" *Newport News* at 392, quoting from *Ulstein Maritime Ltd. V. United States* 833 F.2d 1052, 1054 (1st Cir. 1987)(which quotes from *Smith & Wesson v. United States,* 782 F.2d 1074, 1078 1986). The Court of Appeals noted that the DOD had reduced the *Seawolf* program to only one ship per year, and stated that the Navy concluded "construction rate of one ship per year was inadequate to sustain production at both shipyards." *Newport News* at 393.

In reversing the district court the court of appeals found the Navy's decision to consider and then reject industrial mobilization "reluctant and rational." *Newport News* at 394. The Navy's reduced *Seawolf* requirement of only one new ship per year, a result of the ending of the Cold War, was stated to be only enough to maintain submarine construction at one shipyard.

Therefore, in 1992 the Fourth Circuit reversed a district court decision that had the effect of maintaining the two shipyard strategy described in both the House and the Senate Committee Reports because the Navy's decision to forego spending an additional $73 million to maintain two nuclear capable submarine shipyards at a time when the Navy anticipated building one new nuclear powered attack submarine per year was "rational."

B. By Affirming the District Court's Grant of Summary Judgment the Fourth Circuit Stated that a 1993 Decision to Spend $1.5 Billion to Maintain Two Submarine Shipyards was Consistent with its 1991 Decision in *Newport News*

Prior to the 1995 award of the third *Seawolf* (SSN-23), the entire program was further contracted by the DOD. This contraction resulted in a projected force structure requirement of no new attack submarines beyond SSN-22 (the second *Seawolf)* until after 1998 when the Navy anticipated introduction of a new, smaller class of attack

submarines (the *Virginia* class). As a result of this reduction in force requirements, in 1992 the Navy sent GD its BUR questionnaire. Within three months of the Fourth Circuit decision in *Newport News* GD informed the DOD that sales of its Electric Boat Division, augmented by its four commercial businesses, would decline from approximately $1.7 billion to $665 million in 1998.

As a result of this representation, the BUR recommended constructing a third *Seawolf* submarine and making a sole source award of this vessel to GD even though the submarine was not needed by the Navy to maintain submarine force requirements.

When the Navy made its BUR recommendation, the justification was industrial mobilization, and particularly maintenance of the two nuclear capable submarine shipyards that the Congress had indicated should be considered as a part of all *Seawolf* procurement. As proposed in 1995, the third *Seawolf* would cost $1.5 billion, or more than twice the cost of the first *Seawolf*. In 1991 the Navy considered and "rationally and reluctantly" rejected maintaining two nuclear capable shipyards at a time rather than spending an incremental $73 million. This "rational and reluctant" decision was made despite the fact that the Navy concluded that its decision included a determination that one new submarine award per year would not be capable of sustaining two nuclear capable manufacturers.

During the 1995 Senate hearings NNS presented evidence that the Navy would save approximately $10 billion by continuing with its existing submarine procurement policy of awarding submarines on the basis of cost competition described by the court of appeal as a "reluctant and rational" decision. Although the Navy and GD argued that the cost of the BUR recommendation would be "less" than $10 billion, there was no disagreement that the cost would be at least equal to the $1.5 billion estimated cost of a submarine not needed in the Navy's force deployment plan.

The Fourth Circuit's *Newport News* decision is inconsistent with its decision below in this case. It cannot be rational for the Navy to forego industrial mobilization

considerations in 1991 that it admits will mean the loss of NNS as a submarine manufacturer because it is rational to avoid spending $73 million for this added flexibility and then justify spending an extra $1.5 billion in 1995 for the same manufacturing flexibility at a time when the Navy has reduced its 10 year new submarine requirements from nine to one or two new submarines.

The egregious disparity between an avoided expense of $73 million in 1991 to maintain two facilities to build at least nine new submarines over ten years, and the expenditure of $1.5 billion in 1995 to maintain two shipyards to manufacture at least two submarines over ten years, cannot lead to the legal conclusion of "rational" decision making. Since this disparity represents a significant cost to the U.S. taxpayer, this court should grant certiorari in order to use this Court's supervisory powers in order to ensure uniformity in the Fourth Circuit's decisions relative to *Seawolf* procurement.

The Fourth Circuit's decision is also inconsistent with the decisions by the First and D.C. Circuits cited by the Fourth Circuit in *Newport News*. Notwithstanding the fact that the Fourth Circuit states that its reversal of the district court was based on a finding that the Navy acted reluctantly but rationally, the Fourth Circuit also held that "in the field of government procurement the courts must be sedulous to heed the admonition that their authority to vacate and to enjoin action that is illegal must be exercised with restraint less the courts fall into the error of supposing that they may revise 'action simply because they happen to think it ill considered.'" *Newport News* at 392.

In its opinion and during oral argument the court of appeals referred to its prior decision in *Newport News* as establishing the circuit's position on the subject of *Seawolf* procurement matters. For the two court of appeals decisions to be consistent, this Court should conclude that the Fourth Circuit has adopted a standard that views the $1.4 billion inconsistency in the Navy's decision making as within the bounds of "rational" executive prerogative not subject to judicial scrutiny.

Since the Fourth Circuit's decisions in the case below and in *Newport News* constitutes an erroneous application of the circuit's own "rational" decision test, the Fourth Circuit's decision in *Newport News* and below in this *qui tam* action is actually a "sedulous heeding of the admonition" to simply refuse to apply judicial scrutiny to any executive or legislative procurement decision.

C. Since the Decisions Below are Incompatible within the Circuit and Since these Decisions Represent an Important Conflict between the Circuits, this Court Should Grant Certiorari to Resolve the Conflicts

This Court should grant Certiorari in order to correct the decisions of the court of appeals and ensure their uniformity both within the circuit and with other circuits, including the First Circuit and the D.C. Circuit, that have issued opinions on the subject of judicial review of executive decision making in the area of procurement.

III. THE DECISION BELOW FAILED TO RECOGNIZE FALSE CERTIFICATION LIABILITY UNDER THE FALSE CLAIMS ACT AND DISREGARDED THE CONGRESSIONAL INTENT OF THE FALSE CLAIMS ACT

A. The Decision Below Eviscerates the Congressional Intent of the False Claims Act

This False Claims Act claim was originally filed in May 1999 and, following a decision to not intervene by the United States the complaint was unsealed in December 2000. In the time since the filing of the complaint U.S. financial markets have endured the effects of corporate malfeasance exemplified by the Enron bankruptcy. The Congress passed Sarbanes-Oxley in order to provide reassurance to the financial markets. Enforcement of the False Claims Act assists in achieving the objectives of Sarbanes-Oxley.

Prior to selling MESC, GD developed proprietary design software for power barges. This technology utilizes acoustical design software developed by GD and the Navy to help design "quiet" submarines. GD's sale of MESC was intended to provide MESC the opportunity to use this software and re-employ laid-off shipyard workers. Instead, MESC's design drawings were stolen, taken to Malaysia and ended up in power barges that became a part of the Enron/Anderson & Co. fraud.

Enron and similar examples of failures in corporate governance and oversight placed U.S. financial markets in the decline that marked the beginning of the 21st Century. GD continues to exist in a pre-Sarbanes-Oxley protective cocoon. Anderson & Co. were GD's auditors until their demise. In discovery below, GD and Anderson & Co. refused to provide accountant's work-papers justifying the forecasts in GD's 1992 Report to Shareholders on Form 10-K.

GD defends allegations of violating the False Claims Act by claiming that the inconsistencies between the commercial forecasts prepared by GD for shareholders and for the DOD may constitute securities fraud but not False Claims Act violations.

When GD needed to chose between providing consistent answers in the breach of contract action commenced by MESC's chapter 7 trustee and the False Claims Act proceeding below, GD chose to admit facts in the MESC adversary proceeding that constitute breach of contract and fraud. GD's arguments to the court of appeals below include the argument that neither securities fraud nor fraud against MESC is a violation of the False Claims Act.

The case below represents by far the largest False Claims Act civil action in the history of the statute. Despite assurances provided to the U.S. in 1995 by James Turner, the three *Seawolf* submarines will end up costing the United States between $15 and $20 billion rather than the $3 billion described by Turner in 1995.

The case below also represents the most senior "relator," or whistleblower to come forward pursuant to the

financial encouragement provided by the Congress since the passage of the first *qui tam* statute at the request of President Lincoln. In this case the relator was not an "insider-employee" but a sophisticated and experienced financial entrepreneur. *Qui tam* is short for *qui tam pro domino rege quam pro se ipso in hac parte sequitur,* or "who pursues this action on our Lord the King's behalf as well as his own."

This Court has characterized the False Claims Act stating "the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *United States v. Niefert White Company,* 390 U.S. 228, 232 (1968), see also *Rainwater v. United States,* 356 U.S. 590, 592 (1958)("it seems quite clear that the objective of Congress (in the FCA) was broadly to protect the funds and property of the Government from fraudulent claims").

Petitioner's Request for Rehearing and Rehearing *En Banc* set forth a compelling description of the facts and evidence overlooked by both the trial court and the court of appeals. Although errors of fact or law are generally not proper stand-alone justifications for granting Certiorari, in this case vindication of the Congressional Intent of both the False Claims Act and Sarbanes-Oxley justify granting Certiorari.

GD's September 1992 response to the DOD claimed that sales of GD's Electric Boat Division would decline from 1992 sales of $1.5 billion to 1998 sales of $665 million despite the inclusion of all of GD's commercial businesses in this forecast. Both the district court and the court of appeals have held this representation to be fair and accurate and both tribunals have held that James Turner's 1995 Senate testimony fairly reported these facts.

Assuming the truth of these findings, then GD's December 1992 Report to Shareholders on Form 10-K could not have complied with SEC reporting requirements for financial statements in annual reports to shareholders of public companies. In December 1992 GD's Electric Boat Division was one of only two major business units. Electric Boat represented over 50% of GD's sales and earnings, and,

according to the disclosures made by GD to the DOD in September 1992 GD's Electric Boat Division would experience a sales decrease to a level at which GD claimed Electric Boat would not be a going concern.

Ironically, GD's only other major business in 1993 and 1994 was its tank manufacturing business. In the late 1970's and early 1980's when Chrysler Corporation requested financial assistance from the United States in order to avoid bankruptcy, the United States demanded and received significant financial disclosure from Chrysler. The United States also required Chrysler to sell its tank manufacturing business to a financially viable entity. GD was the successful bidder for Chrysler's tank business.

The decisions below have affirmed the fact that GD was in dire financial circumstances which were never disclosed to shareholders. According to the evidence presented to the district court by petitioner, GD was contemplating winding up its business and distributing all of the funds to shareholders prior to the DOD decision to fund the third *Seawolf*. Given the United States' concern with maintaining vital defense assets in financially secure hands, issues surrounding GD's failure to make timely and full disclosure to shareholders and the SEC violated both SEC Rules and Statutes as well as the procurement policies and understandings of the United States.

In his May 1995 Senate testimony James Turner confirmed the fact that Electric Boat was not financially viable without receipt of a substantial government subsidy in his 1995 Senate Testimony. Responding to a question from Senator Joseph Lieberman about GD intentions for GD's submarine shipyards should the Congress not fund the BUR recommended third *Seawolf* Turner said "we are going to close it at the end of the first quarter of next year, close, walk away, gone."

If GD in fact would have closed down its Electric Boat Division absent approval of funding for the third *Seawolf*, GD never disclosed this fact to its shareholders or to the SEC. This news would require a filing on SEC Form 8-K for a "material development." This filing should have informed shareholders that GD would not be a going

concern without approval of the funding for the third *Seawolf*.

GD argued below that "of course, even if GD had lied to its shareholders (which it certainly did not), that is not a violation of the False Claims Act... the same is true if GD had lied to Gilliam to induce him to buy MESC (which it also certainly did not do). Both the Navy and the Congress were told the truth, and that is all that matters under the Act."

The undisputed evidence demonstrates that GD has a long history of keeping "two sets of books," and threatening and intimidating those that question its dealings with the United States Navy. The undisputed evidence in the *MESC v. GD* fraud action shows that GD defrauded MESC. Despite being compelled, GD did not cooperate in discovery below, refusing to produce accountant work papers dealing with the "two sets of books" issue.

GD turned off the heat on GAO auditors, and accused the father of the nuclear Navy of accepting illegal gratuities when he accused GD of making false claims. By passing and, in 1986 amending the False Claims Act Congress intended to facilitate was vigorous prosecution of government contractor fraud.

In the case below the intent of Congress has not been well served and this Court should therefore grant Certiorari and exercise its supervisory powers and ensure enforcement of the False Claims Act

B. By Affirming the District Court's Decision the Court of Appeals has Denied False Claims Act Liability for False Certifications

The district court decision affirming summary judgment in favor of GD assumes that GD did not make false statements to the United States in their September 1992 responses to the DOD's BUR questionnaire. Therefore GD's disclosures to shareholders in the 1992 10-K could not be correct and did not satisfy the disclosure requirements of the securities laws. Petitioner argued below that either GD made false statements to the DOD or it made false statements to shareholders and the SEC.

GD admits, in its appellee brief below, that the Navy had the right to monitor GD's financial statements and reports and therefore GD's compliance with the federal securities laws was an affirmative covenant in all of their government contracts. By making false statements to the SEC GD violated the False Claims Act by making a "false certification."

A "false certification" theory False Claims Act liability is predicated on false certification of compliance with a federal statute, regulation or contractual term that is a prerequisite to obtaining a government benefit. The Fifth Circuit has identified two elements necessary to state a false certification case of action: 1) the defendant makes a knowingly false certification of compliance with a statute or regulation; and 2) the certification is a prerequisite to payment. *United States v. Southland Management Corp.*, 288 F.3d 665, 679 (5th Cir. 2002).

Both the Fifth and the Fourth Circuits have stated in *dicta* that they might not recognize an "implied certification theory" as contrasted with a "express certification theory," although the Fifth Circuit adopted a "limited" implied certification theory in *U.S. ex rel. Thompson v. Columbia Healthcare Corp.*, 125 F.3d 899 (5th cir. 1997) ("where the government has conditioned payment of a claim upon a claimant's certification of compliance with, for example, a statute or regulation, a claimant submits a false or fraudulent claim when he or she falsely certifies compliance with that statute or regulation").

The Fourth Circuits more limited view of implied certification is found in *U.S. v. Southland* at 679, *Harrison v. Westinghouse, supra* at n8, quoting from *United States ex rel. Joslin v. Community Home Health of Maryland, Inc.*, 984 F.Supp. 374, 384-385 (D. Md. 1997) ("holding, in part, that there can be no False Claims Act liability for an omission without an obligation to disclose, also makes questionable an implied certification claim in the Fourth Circuit. We need not address the validity and problems of an implied certification theory of liability here").

In contrast, the Federal Circuit has adopted the implied certification theory of FCA liability. See *Ab-Tech*

Construction, Inc. v. United States, 31 Fed.Cl. 429 (Fed.Cl. 1994). The Second circuit declined to follow *Ab-Tech* in *Mikes v. Straus,* 274 F.3d 687 (2nd Cir. 2001).

In this case the court of appeals has refused to recognize either express or implied false certification False Claims Act liability. The Fifth and D.C. Circuits recognize false certification liability as committed by GD. GD was required to maintain compliance with the disclosure and reporting requirements of the securities laws as a condition to obtaining new contracts and staying out of default on existing contracts. GD's December 1992 statements to shareholders were far more optimistic than GD's September 1992 statements to the DOD. When GD failed to disclose to shareholders and the SEC that Electric Boat, representing more than 50% of GD's sales and earnings, would be "shut down, walk away" without a government subsidy, GD violated the securities laws.

Since the Fourth circuit does not recognize false certification liability for acts constituting securities fraud, the Fourth Circuit's decision below represents an important conflict within the Circuits justifying the exercise of this Court's supervisory powers.

C. Since the Fourth Circuits Decision Eviscerates Congressional Intent and Represents an Important Conflict within the Circuits, this Court should Grant Certiorari to Restore Congressional Intent and Resolve the Inter-Circuit Conflicts

GD did not stop playing fast and loose with the securities laws when it was successful in obtaining the contract for the third *Seawolf.* GD filed its motion to dismiss in the district court, characterizing the False Claims Act complaint as "frivolous." When the district court denied GD's November 2001 motion to dismiss no disclosures were made to shareholders.

When GD failed to answer the complaint and default was entered by the clerk of Court (on February 12, 2002) GD waited for the release of its 2001 10-K in late March

2002 to disclose the existence of the action, but not its default, which was not set aside until April 10, 2002.

GD defrauded MESC and allowed MESC's proprietary design software to be stolen and used as a part of the Enron/Nigeria fraud.

In light of the facts described in this petition, this Court should use its supervisory powers in order to protect the Congressional Intent of the False Claims Act.

In light of the split of authority in the Circuits over the issue of false certifications this Court should exercise its supervisory powers and ensure uniformity within the circuits on the issue of false certification liability under the False Claims Act.

CONCLUSION

For all of the reasons set forth above petitioner respectfully requests that this Court grant Certiorari.

Respectfully submitted

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

United States ex rel. William J Gilliam, Plaintiff,	)	C/A No. 2:01-3023-18
v.	)	**ORDER**
General Dynamics Corporation, Defendant.	)	

This matter comes before the court on defendant's Motion to Dismiss plaintiff's False Claims Act cause of action. The court heard oral arguments on October 24, 2001.

I. Background

Defendant General Dynamics Corporation's Electric Boat Division builds nuclear submarines for the Navy. At the end of the Cold War, the Navy recognized that there would be a dramatic reduction in the production of nuclear submarines. It further determined that, in case of renewed future defense needs, it would be necessary to maintain two shipyards that could produce nuclear submarines. The Navy also determined that, because of the complexity of the nuclear submarine design, once a shipyard ceases to produce nuclear submarines, it is almost impossible for the

shipyard to become operational again.

The issue in this case is production of the third "Seawolf" submarine. Defendant informed the Navy that unless it was awarded the Seawolf contract without having to go through the competitive bidding process, its Electric Boat Division would not survive. Plaintiff claims that defendant made false statements to the Navy and other government officials concerning its financial situation and its need to receive the Seawolf contract without competitive bidding. Plaintiff claims that defendant had developed commercial alternatives that would have kept Electric Boat in business even without the Seawolf contract. Plaintiff claims that the Navy based its decision to award defendant the Seawolf contract on the allegedly false information.

II. Legal Standard

The purpose of a 12(b)(6) motion is to test the sufficiency of the Complaint, not to decide the merits of the action. See Edwards v. City of Goldsboro, 178 F.3d 231, 243-44. At this stage of the litigation, the plaintiffs well pleaded allegations are taken as true and the Complaint, including all reasonable inferences, is liberally construed in her or his favor. See McNair v. Lend Lease Trucks. Inc., *95* F.3d 325, 327 (4th Cir. 1996).

Dismissal under Rule 12(b)(6) is generally regarded as appropriate only "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Generally, the court looks only to the Complaint itself to ascertain the propriety of a motion to dismiss. See Colleton Reg'l Hosp. v. MRS Medical Review Sys., Inc., 866 F.Supp. 891, 893 (D.S.C. 1994). A court may also consider documents attached to the Complaint and documents incorporated into the Complaint by reference. See Phillips v. LCI Int'l, Inc., 190 F.3d 609, 618 (4th Cir. 1999). A plaintiff need not plead

detailed evidentiary facts, and a Complaint is sufficient if it will give a defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. See Bolding v. Holshouser, 575 F.2d 461, 464 (4th Cir. 1978). Nonetheless, the court cannot ignore a clear failure in the pleadings to allege any facts that set forth a claim, nor can the court assume the existence of a genuine issue of material fact where none exists. See Migdal v. Rowe Price-FlemingInt'l, Inc., 248 F.3d 321, 325 (4th Cir. 2001) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

III. Legal Analysis

At issue in this case is whether defendant made materially false statements to the Navy in order to secure a nuclear submarine contract without going through the competitive bidding process. The False Claims Act allows a private litigant to bring suit, on behalf of the government, against anyone who:

(1)knowingly presents, or causes to be presented, to an officer or employee of the United States Government. . ., a false or fraudulent claim for payment or approval;
(2)knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; [or]
(3)conspires to defraud the Government by getting a false or fraudulent claim allowed or paid.

31 U.S.C.A. § 3729(a) (West 2001); 31 U.S.C.A. § 3730(b) (West 2001). Based on these provisions, the Fourth Circuit has found that the "test for False Claims Act liability. . . is (1) whether there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due (i.e., that involved a 'claim')." Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 788 (4th Cir. 1999).

In this case, defendant claims that plaintiff failed to establish a cause of action under the False Claims Act because (1) he failed to show that the allegedly false statements were material to the Navy's decision to award defendant the submarine contract; (2) the Complaint does not allege any false statements or other allegedly fraudulent conduct with particularity as required by Federal Rule of Civil Procedure 9(b); and (3) this court lacks subject matter jurisdiction over plaintiff's claim pursuant to 31 U.S.C. § 3730(e)(4). (Defendant's Memo. in Supp. of Motion to Dismiss at 3-5).

A. Materiality

In order to be actionable under the False Claims Act, the false statement must be material. The issue of materiality is decided as a matter of law by the court. See United States ex rel. Berge v. Hoard of Trustees of the University of Alabama, 104 F.3d 1453, 1460 (4th Cir. 1997). "[T]he materiality of the false statement turns on 'whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action.'" Id. (quoting United States v. Norris, 749 F.2d 1116, 1122 (4th Cir. 1984)).

As set forth in the Complaint, the following representations made by defendant were allegedly false:

1. That the nuclear submarine industrial base would be at great risk;
2. Reconstitution of the submarine industrial base might be impossible;
3. Corporate-owned waterfront property would be converted to uses other than shipbuilding;
4. Skilled labor for nuclear submarines would be lost;
5. Premature competition would risk permanent loss of Electric Boat;
6. Mandating competition in submarine construction

would in fact eliminate future competition, and

7. The "two yard" (i.e., two shipyards) strategy was the only way to ensure competition for submarine construction in the future.

(Complaint ¶ 8(a)-(g)). Plaintiff contends that these statements were false because defendant had developed commercial alternatives that utilized the skills of Electric Boat's shipyard during the slowdown of military construction, and therefore the skilled workforce needed to build nuclear submarines would be preserved even if defendant were not awarded the submarine contract. (Complaint ¶ 8(h), (i)).

Defendant argues that any statements relating to its commercial ventures were not material to the Navy's decision because these commercial ventures were not capable of maintaining defendant's ability to produce nuclear submarines. (Defendant's Memo. in Supp. of Motion to Dismiss at 3, 12-13). Defendant claims that the Navy was not concerned about Electric Boat's commercial viability but was concerned only about its continued ability to produce nuclear submarines. (Defendant's Memo. in Supp. of Motion to Dismiss at 3-4).

Looking solely at the Complaint, plaintiff has established a claim under the False Claims Act. In his Complaint, plaintiff alleged that defendant intentionally made false statements to the Navy and other government officials. (Complaint ¶¶ 5, 6, 9). Plaintiff stated that the essence of these false statements was that Electric Boat would go out of business if defendant was not awarded the submarine contract. (Complaint ¶ 7). Plaintiff also alleged that the Navy based its decision to award the contract to defendant without competitive bidding on these allegedly false statements. (Complaint ¶ 5). Further, plaintiff alleged that defendant's statements were false because defendant had developed commercial alternatives that would have kept

Electric Boat in business during the anticipated slowdown in submarine construction orders. (Complaint ¶ 7). As a result of the allegedly false statements, plaintiff claimed that the Navy accelerated its submarine building program and spent four billion dollars that did not need to be spent. (Complaint ¶ 7). Finally, plaintiff asserted that defendant submitted false claims to the United States. (Complaint ¶ 10). At this stage in the litigation, where plaintiffs well pleaded allegations are taken as true and the Complaint is construed liberally in plaintiffs favor, plaintiffs Complaint states a cause of action under the False Claims Act.

B. Rule 9(b)

Under Rule 9(b) plaintiff is required to plead fraud with particularity. See Fed. R. Civ. P. 9(b). In Harrison, the Fourth Circuit found that "circumstances required to be pled with particularity under Rule 9(b) are the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." 176 F.3d at 784 (internal citations omitted). The court found that the "'clear intent of Rule 9(b) is to eliminate fraud actions in which all the facts are learned through discovery after the complaint is filed.'" Id. at 789 (quoting United States ex rel. Stinson, Lyons, Gerlin & Bustarnante, P.A. v. Blue Cross Blue Shield, 755 F.Supp. 1040, 1052 (S.D. Ga. 1990)).

In this case, the Complaint states when the allegedly false statements were made, (Complaint ¶ 5), who made the statements, (Complaint ¶ 5), who the statements were made to, (Complaint ¶¶ 5, 6), and what the allegedly false statements were. (Complaint ¶ 8). Plaintiff's Complaint was pleaded with sufficient particularity to meet the requirements under Rule 9(b).

C. Subject Matter Jurisdiction

A claim under the False Claims Act cannot be based on publicly disclosed information. Although Congress wanted to encourage private citizens to help fight fraud against the government, "Congress sought to prevent 'parasitic' qui tam actions in which relators, rather than bringing to light independently discovered information of fraud, simply feed off of previous disclosures of government fraud." United States ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1347 (4th Cir. 1994). As a result, the False Claims Act provides:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless. . . the person bringing the action is an original source of the information.

31 U.S.C.A. § 3730(e)(4)(A) (West 2001). A person is an original source if he or she has "direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing [suit]." 31 U.S.C.A. § 3730(e)(4)(B) (West 2001).

Defendant claims that plaintiff cannot be an original source of the information that defendant was pursuing other commercial alternatives because this information was publicly available long before plaintiff would even have known about it. (Defendant's Memo. in Supp. of Motion to Dismiss at 2 1-22). Defendant contends that plaintiffs exposure to this information "was entirely through public documents." (Defendant's Memo. in Supp. of Motion to Dismiss at 23). Plaintiff, however, claims that the pertinent information is not only that defendant had other commercial opportunities but that these commercial alternatives were sufficient to keep Electric Boat from

going out of business. Plaintiff states: "What Gilliam knows that no one else knew was the value of the commercial options that GD had developed and about which Turner testified. .. (Plaintiffs Memo. in Opp. at 31). Plaintiff noted that "[t]he valuation information came from Turner himself, in his private meetings with Gilliam, and through the confidential disclosures made via the Goldman Sachs information." (Plaintiffs Memo. in Opp. at 31). At this early stage of the litigation, this information is sufficient to show that plaintiff was an original source of information as to the value of the commercial alternatives and the ability of these venture to keep Electric Boat's shipyard operational. This court, therefore, has subject matter jurisdiction over the claim.

IV. Conclusion

Of central importance in this litigation is whether the allegedly false statements made by defendant were material to the Navy's decision to award it the nuclear submarine contract without competitive bidding. Although plaintiffs allegations are sufficient to state a claim under the liberal notice requirements, plaintiff will now be required to present evidence to support his allegations that the allegedly false statements were material to the Navy's decision. Specifically, plaintiff will be required to show that the commercial activities of Electric Boat could maintain the skills and workforce needed to produce nuclear submarines.

For the reasons set forth above, it is therefore, **ORDERED** that defendant's Motion to Dismiss be **DENIED**, without prejudice.

IT IS FURTHER ORDERED that the parties have ninety days to conduct discovery as to the materiality of the allegedly false statements made by defendant.

IT IS FURTHER ORDERED that the parties submit any

Motions for Summary Judgment with regard to materiality by March 15, 2002.

AND IT IS SO ORDERED.

_____

DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

November_____, 2001
Charleston, South Carolina

FILED

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

OCT 16, 2002
LARRY W. PROPES, CLERK
CHARLESTON, SC

WILLIAM GILLIAM,

Plaintiff,

vs.

SUMMARY JUDGMENT
IN A CIVIL CASE
Civil Action No. 2:01cv3023-12

GENERAL DYNAMICS,

Defendant.

Decision by the Court. This matter came before the court for hearing on motion of the defendant for summary judgment. The court has heard the issues and a decision has been rendered granting the motion of the defendant for summary judgment,

IT IS ORDERED AND ADJUDGED that summary judgment is hereby entered as to the defendant GENERAL DYNAMICS and this case is hereby dismissed.

APPROVED BY:

_____

C.WESTON HOUCK
UNITED STATES DISTRICT JUDGE

October 16, 2002

LARRY W. PROPES, CLERK
UNITED STATES DISTRICT COURT

_____

Deputy Clerk

11:26 pm

JUDGMENT

FILED: July 12, 2004

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

FILED
SEP 20 2004
LARRY W. PROPES, CLERK
CHARLESTON, SC

NO. 03-1912
CA-01-3023-12-2

UNITED STATES EX REL WILLIAM J. GILLIAM

Plaintiff - Appellant

V.

GENERAL DYNAMICS CORPORATION

Defendant - Appellee

and

UNITED STATES OF AMERICA

Party in Interest

Appeal from the United States District Court for the
District of South Carolina at Charleston

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor

CLERK

A True Copy, Teste:
Patricia S. Connor, Clerk
BY_____
Deputy Clerk

UNITED STATES ex rel. WILLIAM J. GILLIAM, Plaintiff-Appellant, v. GENERAL DYNAMICS CORPORATION, Defendant-Appellee, and UNITED STATES OF AMERICA, Party in Interest.

No. 03-1912

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

2004 U.S. App. LEXIS 14261

May 7, 2004, Argued
July 12, 2004, Decided

NOTICE: [*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the District of South Carolina, at Charleston. (CA-01-3023-12-2). C. Weston Houck, Senior District Judge.

DISPOSITION: Affirmed.

LexisNexis(R) Headnotes

COUNSEL: ARGUED: Gregg Meyers, Charleston, South Carolina, for Appellant.

Richard Thomas Franch, JENNER & BLOCK, Chicago, Illinois, for Appellee.

ON BRIEF: Lawrence S. Schaner, John T. Ruskusky, JENNER & BLOCK, Chicago, Illinois, for Appellee.

JUDGES: Before NIEMEYER, MICHAEL, and TRAXLER, Circuit Judges.

OPINION: PER CURIAM:

The district court granted summary judgment to the defendant, General Dynamics Corporation, in this qui tam suit brought by William J. Gilliam under the False Claims Act, *31 U.S.C. § 3729 et seq.* We affirm.

General Dynamics is a defense supplier with a division called Electric Boat. Electric Boat is one of only two nuclear capable shipbuilders in the country (the other is Newport News Shipbuilding and Dry Dock Company). In the 1980s and 1990s, Electric Boat was awarded the contracts for all three Seawolf [*2] class nuclear attack submarines. Part of the history of the Seawolf is set forth in *Newport News Shipbuilding & Dry Dock Co. v. General Dynamics Corp., 960 F.2d 386 (4th Cir. 1992)*. For our purposes, it suffices to explain that Congress scaled back the number of Seawolf submarines it planned to authorize after the end of the Cold War. Congress engaged in considerable debate over whether to authorize the final Seawolf, the SSN-23. The proponents of the SSN-23 argued that building the sub was necessary in order to maintain the country's industrial capacity to build nuclear submarines, which required two nuclear capable shipyards, until the next class of nuclear submarines was authorized. Congress eventually authorized the SSN-23, and the contract was sole-sourced to Electric Boat. Gilliam brought this suit on behalf of the United States under the False Claims Act, alleging that General Dynamics's Electric Boat

division made false statements that induced the United States to award the SSN-23 contract to Electric Boat without competitive bidding. The district court granted summary judgment to General Dynamics.

The elements of a False Claims Act claim are: (1) "a false [*3] statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due." *Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 788 (4th Cir. 1999)*. Materiality in a civil False Claims Act case is a "mixed question of law and fact." *Id. at 785*. Gilliam alleges only that the decision to *sole-source* the SSN-23 was prompted by Electric Boat's misrepresentations. He does not allege that Electric Boat made any misrepresentations inducing Congress to authorize construction of the final Seawolf. Gilliam's theory is that Electric Boat lied to the government by saying it would go out of business unless it received the SSN-23 contract without competitive bidding. Alternatively, he argues that Electric Boat should have informed Congress that it had, but chose not to pursue, potentially lucrative commercial opportunities that would have kept the company afloat without the SSN-23. The United States was damaged, Gilliam's theory goes, because it paid more for the SSN-23 than it would have if the contract had been competitively bid. [*4] Gilliam says that bidding the SSN-23 would have kept Electric Boat honest and held down the cost of the SSN-23, even though the record indicates that Newport News would not have been price competitive with Electric Boat.

We review the grant of summary judgment de novo. *Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 817 (4th Cir. 1995)*. Assuming for the sake of argument that Gilliam's theory would be actionable under the False Claims Act, we conclude that there is no genuine issue of material fact on the false statement or materiality elements and that General Dynamics is therefore entitled to summary judgment. *See id.*

There is no evidence to support Gilliam's argument that Electric Boat told the government it would shut down if it was merely forced to submit a bid for the SSN-23. Electric Boat's president, Jim Turner, did tell Congress that "premature competition will drive up costs unnecessarily and risk permanent loss of Electric Boat," but he was referring only to the competition scheme the government was considering for the next class of nuclear attack submarines, not the SSN-23. J.A. 347. Although we construe the evidence in the light most favorable to [*5] the non-moving party at summary judgment, we do not take evidence out of context. *Sylvia Dev. Corp., 48 F.3d at 821-22.* A factfinder simply could not construe Turner's statement as saying anything false about competition for the SSN-23. *See id. at 822.*

Gilliam's alternative argument (that Electric Boat should have disclosed that it chose not to pursue commercial opportunities, prompting the government to sole-source the SSN-23 to Electric Boat) fares no better. Again, there is no genuine issue of material fact on the false statement element because Electric Boat did disclose both to Congress and the Navy that it considered commercial opportunities, but had abandoned them. Furthermore, there is no evidence that any lack of disclosure was material to the decision to sole-source the SSN-23 to Electric Boat. Assuming Electric Boat's foregone business opportunities would have been as lucrative as Gilliam claims, they at most indicate that Electric Boat could have survived as a commercial entity without the SSN-23 contract. The evidence in the record, however, indicates that the government was interested in maintaining nuclear shipyard capacity. No evidence [*6] indicates that the commercial opportunities would have preserved Electric Boat's capacity to build nuclear ships. Thus, Electric Boat's failure to disclose its foregone commercial opportunities could not have been material to the decision to sole-source the SSN-23. For the foregoing reasons, the judgment of the district court is *AFFIRMED.*

Title 2 § 192. Refusal of witness to testify or produce papers

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

Title 10 USC § 2305 . Contracts: planning, solicitation, evaluation, and award procedures.

(a)

(1)

(A) In preparing for the procurement of property or services, the head of an agency shall—

(i) specify the agency's needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement;

(ii) use advance procurement planning and market research; and

(iii) develop specifications in such manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.

(B) Each solicitation under this chapter shall include specifications which—

(i) consistent with the provisions of this chapter,

permit full and open competition; and
(ii) include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the agency or as authorized by law.
(C) For the purposes of subparagraphs (A) and (B), the type of specification included in a solicitation shall depend on the nature of the needs of the agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—
(i) function, so that a variety of products or services may qualify;
(ii) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or
(iii) design requirements.
(2) In addition to the specifications described in paragraph (1), a solicitation for sealed bids or competitive proposals (other than for a procurement for commercial items using special simplified procedures or a purchase for an amount not greater than the simplified acquisition threshold) shall at a minimum include—
(A) a statement of—
(i) all significant factors and significant subfactors which the head of the agency reasonably expects to consider in evaluating sealed bids (including price) or competitive proposals (including cost or price, cost-related or price-related factors and subfactors, and noncost-related or nonprice-related factors and subfactors); and
(ii) the relative importance assigned to each of those factors and subfactors; and
(B)
(i) in the case of sealed bids—
(I) a statement that sealed bids will be evaluated without discussions with the bidders; and
(II) the time and place for the opening of the sealed

bids; or
(ii) in the case of competitive proposals—
(I) either a statement that the proposals are intended to be evaluated with, and award made after, discussions with the offerors, or a statement that the proposals are intended to be evaluated, and award made, without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) unless discussions are determined to be necessary; and
(II) the time and place for submission of proposals.
(3)
(A) In prescribing the evaluation factors to be included in each solicitation for competitive proposals, the head of an agency—
(i) shall clearly establish the relative importance assigned to the evaluation factors and subfactors, including the quality of the product or services to be provided (including technical capability, management capability, prior experience, and past performance of the offeror);
(ii) shall include cost or price to the Federal Government as an evaluation factor that must be considered in the evaluation of proposals; and
(iii) shall disclose to offerors whether all evaluation factors other than cost or price, when combined, are—
(I) significantly more important than cost or price;
(II) approximately equal in importance to cost or price; or
(III) significantly less important than cost or price.
(B) The regulations implementing clause (iii) of subparagraph (A) may not define the terms "significantly more important" and "significantly less important" as specific numeric weights that would be applied uniformly to all solicitations or a class of solicitations.
(4) Nothing in this subsection prohibits an agency

from—

(A) providing additional information in a solicitation, including numeric weights for all evaluation factors and subfactors on a case-by-case basis; or

(B) stating in a solicitation that award will be made to the offeror that meets the solicitation's mandatory requirements at the lowest cost or price.

(5) The head of an agency, in issuing a solicitation for a contract to be awarded using sealed bid procedures, may not include in such solicitation a clause providing for the evaluation of prices for options to purchase additional property or services under the contract unless the head of the agency has determined that there is a reasonable likelihood that the options will be exercised.

(b)

(1) The head of an agency shall evaluate sealed bids and competitive proposals and make an award based solely on the factors specified in the solicitation.

(2) All sealed bids or competitive proposals received in response to a solicitation may be rejected if the head of the agency determines that such action is in the public interest.

(3) Sealed bids shall be opened publicly at the time and place stated in the solicitation. The head of the agency shall evaluate the bids in accordance with paragraph (1) without discussions with the bidders and, except as provided in paragraph (2), shall award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and the other price-related factors included in the solicitation. The award of a contract shall be made by transmitting, in writing or by electronic means, notice of the award to the successful bidder. Within three days after the date of contract award, the head of the agency shall notify, in

writing or by electronic means, each bidder not awarded the contract that the contract has been awarded.

(4)

(A) The head of an agency shall evaluate competitive proposals in accordance with paragraph (1) and may award a contract—

(i) after discussions with the offerors, provided that written or oral discussions have been conducted with all responsible offerors who submit proposals within the competitive range; or

(ii) based on the proposals received, without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) provided that the solicitation included a statement that proposals are intended to be evaluated, and award made, without discussions, unless discussions are determined to be necessary.

(B) If the contracting officer determines that the number of offerors that would otherwise be included in the competitive range under subparagraph (A)(i) exceeds the number at which an efficient competition can be conducted, the contracting officer may limit the number of proposals in the competitive range, in accordance with the criteria specified in the solicitation, to the greatest number that will permit an efficient competition among the offerors rated most highly in accordance with such criteria.

(C) Except as provided in paragraph (2), the head of the agency shall award a contract with reasonable promptness to the responsible source whose proposal is most advantageous to the United States, considering only cost or price and the other factors included in the solicitation. The head of the agency shall award the contract by transmitting, in writing or by electronic means, notice of the award to such source and, within three days after the date of contract

award, shall notify, in writing or by electronic means, all other offerors of the rejection of their proposals. This subparagraph does not apply with respect to the award of a contract for the acquisition of perishable subsistence items.

(5)

(A) When a contract is awarded by the head of an agency on the basis of competitive proposals, an unsuccessful offeror, upon written request received by the agency within 3 days after the date on which the unsuccessful offeror receives the notification of the contract award, shall be debriefed and furnished the basis for the selection decision and contract award. The head of the agency shall debrief the offeror within, to the maximum extent practicable, five days after receipt of the request by the agency.

(B) The debriefing shall include, at a minimum—

(i) the agency's evaluation of the significant weak or deficient factors in the offeror's offer;

(ii) the overall evaluated cost and technical rating of the offer of the contractor awarded the contract and the overall evaluated cost and technical rating of the offer of the debriefed offeror;

(iii) the overall ranking of all offers;

(iv) a summary of the rationale for the award;

(v) in the case of a proposal that includes a commercial item that is an end item under the contract, the make and model of the item being provided in accordance with the offer of the contractor awarded the contract; and

(vi) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the agency.

(C) The debriefing may not include point-by-point comparisons of the debriefed offeror's offer with other

offers and may not disclose any information that is exempt from disclosure under section 552 (b) of title 5.
(D) Each solicitation for competitive proposals shall include a statement that information described in subparagraph (B) may be disclosed in post-award debriefings.
(E) If, within one year after the date of the contract award and as a result of a successful procurement protest, the agency seeks to fulfill the requirement under the protested contract either on the basis of a new solicitation of offers or on the basis of new best and final offers requested for that contract, the agency shall make available to all offerors—
(i) the information provided in debriefings under this paragraph regarding the offer of the contractor awarded the contract; and
(ii) the same information that would have been provided to the original offerors.
(6)
(A) When the contracting officer excludes an offeror submitting a competitive proposal from the competitive range (or otherwise excludes such an offeror from further consideration prior to the final source selection decision), the excluded offeror may request in writing, within three days after the date on which the excluded offeror receives notice of its exclusion, a debriefing prior to award. The contracting officer shall make every effort to debrief the unsuccessful offeror as soon as practicable but may refuse the request for a debriefing if it is not in the best interests of the Government to conduct a debriefing at that time.
(B) The contracting officer is required to debrief an excluded offeror in accordance with paragraph (5) only if that offeror requested and was refused a preaward debriefing under subparagraph (A).
(C) The debriefing conducted under subparagraph (A)

shall include—
(i) the executive agency's evaluation of the significant elements in the offeror's offer;
(ii) a summary of the rationale for the offeror's exclusion; and
(iii) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the executive agency.
(D) The debriefing conducted under subparagraph (A) may not disclose the number or identity of other offerors and shall not disclose information about the content, ranking, or evaluation of other offerors' proposals.
(7) The contracting officer shall include a summary of any debriefing conducted under paragraph (5) or (6) in the contract file.
(8) The Federal Acquisition Regulation shall include a provision encouraging the use of alternative dispute resolution techniques to provide informal, expeditious, and inexpensive procedures for an offeror to consider using before filing a protest, prior to the award of a contract, of the exclusion of the offeror from the competitive range (or otherwise from further consideration) for that contract.
(9) If the head of an agency considers that a bid or proposal evidences a violation of the antitrust laws, he shall refer the bid or proposal to the Attorney General for appropriate action.
(c) The Secretary of Defense shall ensure that before a contract for the delivery of supplies to the Department of Defense is entered into—
(1) when the appropriate officials of the Department are making an assessment of the most advantageous source for acquisition of the supplies (considering quality, price, delivery, and other factors), there is a

review of the availability and cost of each item of supply—

(A) through the supply system of the Department of Defense; and

(B) under standard Government supply contracts, if the item is in a category of supplies defined under regulations of the Secretary of Defense as being potentially available under a standard Government supply contract; and

(2) there is a review of both the procurement history of the item and a description of the item, including, when necessary for an adequate description of the item, a picture, drawing, diagram, or other graphic representation of the item.

(d)

(1)

(A) The Secretary of Defense shall ensure that, in preparing a solicitation for the award of a development contract for a major system, the head of an agency consider requiring in the solicitation that an offeror include in its offer proposals described in subparagraph (B). In determining whether to require such proposals, the head of the agency shall give due consideration to the purposes for which the system is being procured and the technology necessary to meet the system's required capabilities. If such proposals are required, the head of the agency shall consider them in evaluating the offeror's price.

(B) Proposals referred to in the first sentence of subparagraph (A) are the following:

(i) Proposals to incorporate in the design of the major system items which are currently available within the supply system of the Federal agency responsible for the major system, available elsewhere in the national supply system, or commercially available from more than one source.

(ii) With respect to items that are likely to be required

in substantial quantities during the system's service life, proposals to incorporate in the design of the major system items which the United States will be able to acquire competitively in the future.

(2)

(A) The Secretary of Defense shall ensure that, in preparing a solicitation for the award of a production contract for a major system, the head of an agency consider requiring in the solicitation that an offeror include in its offer proposals described in subparagraph (B). In determining whether to require such proposals, the head of the agency shall give due consideration to the purposes for which the system is being procured and the technology necessary to meet the system's required capabilities. If such proposals are required, the head of the agency shall consider them in evaluating the offeror's price.

(B) Proposals referred to in the first sentence of subparagraph (A) are proposals identifying opportunities to ensure that the United States will be able to obtain on a competitive basis items procured in connection with the system that are likely to be reprocured in substantial quantities during the service life of the system. Proposals submitted in response to such requirement may include the following:

(i) Proposals to provide to the United States the right to use technical data to be provided under the contract for competitive reprocurement of the item, together with the cost to the United States, if any, of acquiring such technical data and the right to use such data.

(ii) Proposals for the qualification or development of multiple sources of supply for the item.

(3) If the head of an agency is making a noncompetitive award of a development contract or a production contract for a major system, the factors specified in paragraphs (1) and (2) to be considered in evaluating an offer for a contract may be considered as

objectives in negotiating the contract to be awarded. Such objectives may not impair the rights of prospective contractors or subcontractors otherwise provided by law.

(4)

(A) Whenever the head of an agency requires that proposals described in paragraph (1)(B) or (2)(B) be submitted by an offeror in its offer, the offeror shall not be required to provide a proposal that enables the United States to acquire competitively in the future an identical item if the item was developed exclusively at private expense unless the head of the agency determines that—

(i) the original supplier of such item will be unable to satisfy program schedule or delivery requirements; or

(ii) proposals by the original supplier of such item to meet the mobilization requirements are insufficient to meet the agency's mobilization needs.

(B) In considering offers in response to a solicitation requiring proposals described in paragraph (1)(B) or (2)(B), the head of an agency shall base any evaluation of items developed exclusively at private expense on an analysis of the total value, in terms of innovative design, life-cycle costs, and other pertinent factors, of incorporating such items in the system.

(e) Protest File.—

(1) If, in the case of a solicitation for a contract issued by, or an award or proposed award of a contract by, the head of an agency, a protest is filed pursuant to the procedures in subchapter V of chapter 35 of title 31 and an actual or prospective offeror so requests, a file of the protest shall be established by the procuring activity and reasonable access shall be provided to actual or prospective offerors.

(2) Information exempt from disclosure under section 552 of title 5 may be redacted in a file established pursuant to paragraph (1) unless an applicable

protective order provides otherwise.

(f) Agency Actions on Protests.— If, in connection with a protest, the head of an agency determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, the head of the agency—

(1) may take any action set out in subparagraphs (A) through (F) of subsection (b)(1) of section 3554 of title 31; and

(2) may pay costs described in paragraph (1) of section 3554 (c) of title 31 within the limits referred to in paragraph (2) of such section.

(g) Prohibition on Release of Contractor Proposals.—

(1) Except as provided in paragraph (2), a proposal in the possession or control of an agency named in section 2303 of this title may not be made available to any person under section 552 of title 5.

(2) Paragraph (1) does not apply to any proposal that is set forth or incorporated by reference in a contract entered into between the Department and the contractor that submitted the proposal.

(3) In this subsection, the term "proposal" means any proposal, including a technical, management, or cost proposal, submitted by a contractor in response to the requirements of a solicitation for a competitive proposal.

Title 18 § 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
(2) makes any materially false, fictitious, or fraudulent statement or representation; or
(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
shall be fined under this title or imprisoned not more than 5 years, or both.
(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.
(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—
(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or
(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

Title 18 § 1003. Demands against the United States
Whoever knowingly and fraudulently demands

or endeavors to obtain any share or sum in the public stocks of the United States, or to have any part thereof transferred, assigned, sold, or conveyed, or to have any annuity, dividend, pension, wages, gratuity, or other debt due from the United States, or any part thereof, received, or paid by virtue of any false, forged, or counterfeited power of attorney, authority, or instrument, shall be fined under this title or imprisoned not more than five years, or both; but if the sum or value so obtained or attempted to be obtained does not exceed $1,000, he shall be fined under this title or imprisoned not more than one year, or both.

Title 31 U.S.C. § 3729. False claims
(a) Liability for Certain Acts.— Any person who—
(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;
(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which

the person receives a certificate or receipt;
(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or
(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,
is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—
(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;
(B) such person fully cooperated with any Government investigation of such violation; and
(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;
the court may assess not less than 2 times the

amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and Knowingly Defined.— For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim Defined.— For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption From Disclosure.— Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion.— This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

Title 31 § 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General.— The

Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by Private Persons.—

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the

action, in which case the person bringing the action shall have the right to conduct the action.
(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.
(c) Rights of the Parties to Qui Tam Actions.—
(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).
(2)
(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.
(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.
(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—
(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;
(iii) limiting the person's cross-examination of witnesses; or
(iv) otherwise limiting the participation by the person in the litigation.
(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.
(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.
(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to Qui Tam Plaintiff.—

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [1] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case

to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action

and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain Actions Barred.—

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)

(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)

(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [2] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney

General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government Not Liable for Certain Expenses.— The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and Expenses to Prevailing Defendant.— In civil actions brought under this section by the United States, the provisions of section 2412 (d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

No. 04-789

Supreme Court, U.S.
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In The

Supreme Court of the United States

UNITED STATES *ex rel.* WILLIAM J. GILLIAM,

Petitioner,

v.

GENERAL DYNAMICS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether certiorari should be granted to review the issues presented by petitioner, where: (a) the court of appeals affirmed the grant of summary judgment in favor of respondent based on petitioner's failure to show basic elements of a cause of action under the False Claims Act, i.e., a false statement that was material to the decision to award a government contract; (b) neither the court of appeals nor the district court reached or discussed in any manner petitioner's first and second questions for review; and (c) petitioner did not raise or present his third and fourth questions for review to either the district court or the court of appeals, and neither court considered the issues.

PARTIES TO THE PROCEEDINGS BELOW

The following individuals or entities were parties to the proceedings in the district court and the court of appeals:

Petitioner
William J. Gilliam ("Gilliam")
Respondent
General Dynamics Corporation ("General Dynamics")

CORPORATE DISCLOSURE STATEMENT

General Dynamics has no parent corporation, and no publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

In this action, Gilliam alleged that General Dynamics violated the False Claims Act by making false statements to the United States government to procure the award of a contract for construction of the SSN-23 submarine. After reviewing the extensive, comprehensive factual record, the district court granted summary judgment in favor of General Dynamics, finding that General Dynamics made no false statements to the government and that, in any event, the false statements alleged by Gilliam were not material to any government decision with regard to the SSN-23. The court of appeals, reviewing the district court's decision de novo, affirmed, agreeing with the district court's findings that there was no evidence of false statements and no evidence of materiality. Neither court reached any of the four questions presented by Gilliam to this Court for review. The third and fourth questions presented by Gilliam were not even raised in the district court or the court of appeals.

STATEMENT OF THE CASE

This is a qui tam suit brought pursuant to the False Claims Act, 31 U.S.C. § 3729. Gilliam alleged that General Dynamics lied to the government by saying that its Electric Boat division would go out of business unless it was awarded the contract to build the SSN-23 (later named the "Jimmy Carter") without competitive bidding. Like the district court, the court of appeals held that Gilliam failed to demonstrate two essential elements of his asserted cause of action; specifically, the court held that Gilliam did not demonstrate that General Dynamics made a false statement, and, even if it had, Gilliam did not demonstrate

that the false statements that he alleged were material to the government's decision to award the SSN-23 contract to General Dynamics. (A.26-A.45, R.127-129[1]; *United States ex rel. Gilliam v. General Dynamics Corp.*, 111 Fed. Appx. 143, 144-45, 2004 WL 1542764, at *2 (4th Cir. July 12, 2004) (unpublished) (Pet.'s App. at 15-16).) The court did not reach – or was not even presented with – the questions on which Gilliam now seeks review.

In support of his petition, Gilliam presents this Court with numerous, unsupported allegations that are neither part of, nor supported by, the record below. The record in this matter demonstrates the following facts.

A. The Parties.

General Dynamics is a supplier of sophisticated defense systems, headquartered in Falls Church, Virginia. (A.242, Tab 4.) In 1995, General Dynamics had two main divisions: Land Systems, which designs and builds armored vehicles for the United States Army, the United States Marine Corps, and international customers; and Electric Boat. (*Id.*)

Electric Boat is in the business of designing and constructing nuclear submarines for its customer, the United States Navy. (*Id.*; A.437, Tab 7 ¶ 2.) As recognized by the Navy, Electric Boat is the United States' preeminent submarine designer and premier resource for submarine

[1] Citations are to the joint appendix that accompanied the parties' briefs in the court of appeals. The district court set forth its findings in the Transcript of Motion Hearing Before the Honorable C. Weston Houck, included at A.28-A.44.

design and construction technology. (A.290, Tab 5 at 154; A.549, Tab 13 at 123; A.652, Tab 19 at 56.)

B. The Seawolf Submarine Program and the End of the Cold War.

In 1982, the Navy began development of the Seawolf class of nuclear attack submarines. *See Newport News Shipbuilding & Dry Dock Co. v. General Dynamics Corp.*, 960 F.2d 386, 388 (4th Cir. 1992). The Seawolf was designed to achieve unprecedented levels of technical performance and war-fighting capability. *Id.* The Navy originally planned to construct 29 Seawolf class submarines. (A.558, Tab 13 at 167.) In 1989, Electric Boat competed against Newport News Shipbuilding ("NNS") for the contract to build the first Seawolf class submarine, the SSN-21.[2] *Newport News*, 960 F.2d at 389. The Navy awarded the contract to Electric Boat because it was the low cost bidder. (*Id.*; A.591-A.592, Tab 18 at 66-67.)

In 1989, as Electric Boat built the first Seawolf (the SSN-21), the Berlin Wall fell, and, in 1991, the Soviet Union dissolved, ending the Cold War. *Newport News*, 960 F.2d at 389. As a result, in the face of significant defense budget reductions, the Navy had to reformulate its submarine procurement plans. *Id.* The Seawolf program was

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[2] There are only two shipyards in the United States that are capable of manufacturing nuclear submarines: Electric Boat, headquartered in Groton, Connecticut, and Newport New Shipbuilding, headquartered in Newport News, Virginia. Electric Boat and Newport News have been the United States' only builders of nuclear submarines since the late 1970s. (A.564-A.565, Tab 18 at 12-13.) Newport News is also the United States' sole manufacturer of nuclear-powered aircraft carriers. (A.526, Tab 13 at 35.)

reduced from 29 ships to three ships. (A.331, Tab 5 at 195.) In 1991, instead of procuring two Seawolf class submarines as planned, the Navy put out only one contract for bid, the SSN-22. *Newport News*, 960 F.2d at 389. In the competition with NNS, Electric Boat again was the low cost bidder; the government awarded the SSN-22 contract to Electric Boat in May 1991. (*Id.* at 390-91; A.592, Tab 18 at 67.)

In January 1992, the Bush administration canceled the remaining Seawolf program and rescinded the prior authorizations for the SSN-22 and SSN-23. (*See* A.525, Tab 13 at 33.) In March 1992, then-presidential candidate William J. Clinton pledged to the employees at Electric Boat's principal facility in Groton, Connecticut, that both the SSN-22 and the SSN-23 would be built by Electric Boat if he were elected. (A.190, Tab 11; A.259, Tab 5 at 108.) In May 1992, Congress overrode the rescission and re-authorized the SSN-22. (A.738, Tab 23 at 51.) Congress also allocated $540 million to support the SSN-23, if authorized, or other actions that might help to preserve the industrial base for nuclear submarine construction. (*Id.*; *see* A.280, Tab 5 at 144; A.392, Tab 27 at 000102.)

Even with the re-authorization of the SSN-22, the number of submarines to be built decreased dramatically, threatening a lengthy gap between the last then-authorized submarine (the SSN-22) in 1991 and the New Attack Submarine, which was not scheduled to begin production until 1998. (A.266, Tab 5 at 130.)

This seven-year gap in new submarine authorizations presented a marked contrast to prior construction levels. In the 1980s, Congress authorized construction of three to four nuclear attack submarines (the Los Angeles/688 class

and the Seawolf class) per year and one nuclear ballistic missile submarine (the Trident class) per year. (*Id.*; *see also* A.480, Tab 16 at 35.) Between 1992 and 1994, government and independent private "think tanks" (e.g., the RAND Corporation) conducted numerous comprehensive studies about the effect of the reduction and the resultant production gap on the nuclear submarine industrial base. (A.279, A.294, Tab 5 at 143, 158; A.574, A.577-A.580, A.589-A.590, Tab 18 at 23, 26-29, 64-65; A.536-A.537, Tab 13 at 78-79.)

In August 1992, as part of one of its studies, the Navy sent Electric Boat a questionnaire (the "1992 questionnaire"). (A.199-A.200, Tab 1; A.529-A.531, Tab 13 at 46-48.) One area of inquiry related to Electric Boat's commercial business. (A.208, Tab 1 at I-10.) Electric Boat accurately responded that it was exploring commercial business, that commercial work accounted for approximately 1% of its current sales, and that it forecasted this work to account for 1% or less of its total future sales, with its remaining business coming from the Navy. (A.206-A.210, Tab 1 at I-8-I-10, I-17; A.424-A.426, Tab 9 ¶¶ 5-8.) It further responded that "[a]dditional new [submarine] construction work is needed however to bridge [the submarine construction] gap between now and 1998." (A.204, Tab 1 at I-6.)

In the Spring of 1993, shortly after the Clinton administration took office, the Department of Defense ("DoD") initiated a Bottom Up Review ("BUR") of major weapons programs. Topics of the review included whether to maintain two nuclear capable shipyards and how to maintain the nuclear submarine industrial base. (A.571-A.572, A.574-A.575, Tab 18 at 19-20, 23-24.) In the Fall of 1993, the BUR concluded that Electric Boat should construct the

SSN-23, in part to preserve the submarine industrial base and bridge the projected gap in submarine production. (A.588-A.589, Tab 18 at 63-64; A.538-A.539, Tab 13 at 99-100.) Other independent and government studies reached the same conclusion. (A.279, Tab 5 at 143; A.586 A.589, Tab 18 at 61-64.)

In the Spring of 1994, Nora Slatkin, Assistant Secretary of the Navy for Research, Development and Acquisition, approved the sole-source award of the SSN-23 contract to Electric Boat. (A.402, Tab 27 at 000112). Ms. Slatkin offered several justifications for her decision to award the contract to Electric Boat without competitive bidding: to bridge the gap in nuclear submarine production; to ensure the continued viability of the submarine industrial base; to protect the nation's ability to build nuclear submarines in the future; and to prevent the loss of Electric Boat's nuclear submarine production skills. (A.399, Tab 27 at 000109.)

Even if there had been competitive bidding, Electric Boat would have been awarded the contract; its only potential competitor, NNS, so acknowledged. In March 1991, Edward Campbell, then president and CEO of NNS, testified before Congress: "[A]lthough we could theoretically bid on the third or fourth Seawolf, realistically Newport News would be too far behind Electric Boat on the learning curve to be able to compete." (A.186, Tab 28 at 586; *see also* A.187, Tab 28 at 592; A.591, Tab 18 at 66.) At a Congressional hearing in April 1995, NNS reiterated that it could not compete for the SSN-23. William Fricks, then president and COO of NNS, when asked whether Electric Boat would be awarded the third Seawolf stated: "Certainly if it is approved, they will. We [NNS] are not in

the Seawolf business today. They [Electric Boat] have built two." (A.253, Tab 29.)

C. Electric Boat's Commercial Opportunities (or Lack Thereof).

At the same time that the Navy was re-formulating its submarine plans in light of shrinking defense budgets, Electric Boat was exploring its options, which included the pursuit of potential commercial ventures. Electric Boat assigned several business unit managers to investigate commercial opportunities. (A.437-A.438, Tab 7 ¶ 3; A.440, Tab 8 ¶ 2; *see also* A.729, A.733, Tab 23 at 4, 27.) Through these and other efforts, Electric Boat was able to secure two small commercial contracts: one for approximately $23 million to build waste digester tanks and one for approximately $1.7 million to build storage racks for spent nuclear fuel rods. (A.438, Tab 7 ¶ 3.) Both contracts proved unprofitable. (*Id.*; A.441, Tab 8 ¶ 4; A.705-A.706, Tab 20 at 77-78; A.734, Tab 23 at 34.) Other commercial opportunities that Electric Boat considered, such as liquefied natural gas ("LNG") spheres, barge mounted power plants ("BMPPs") and ocean thermal energy conversion ("OTEC") failed to result in any work. Despite Electric Boat's efforts, commercial work continued to constitute less than 1% of Electric Boat's revenues. (A.456-A.457, Tab 14 at 90-91; A.425, Tab 9 ¶ 7; A.438, Tab 7 ¶ 5.)

In the Fall of 1993, Electric Boat decided to cease its efforts to develop commercial business and to focus solely on nuclear submarine design and production, its core competency for four decades. (A.227-A.228, Tab 3 at 6-7; A.438, Tab 7 ¶ 4; A.440-A.441, Tab 8 ¶ 3; A.237, R.50, Ex. 4 at 6; *see* A.328, Tab 5 at 192; A.435, R.43, App. B ¶ 20.) It

planned to survive at a low level of submarine work – as little as ½ submarine per year. (A.227, Tab 3 at 6; A.341, Tab 5 at 205; A.720, Tab 22 at 25.)

Electric Boat's decision to exit commercial work was well publicized. The Navy was aware that, because Electric Boat had "lost their pants" on its commercial forays, it had given up on commercial activity. (A.585, A.594-A.595, Tab 18 at 58, 72-73.)

The government, including Congress, was directly and unambiguously told precisely that. On December 8, 1993, Electric Boat met with officials from the General Accounting Office ("GAO"), commonly called the "investigative arm of Congress" or the "congressional watchdog," the Navy Supervisor of Shipbuilding ("SupShip"), and the Naval Reactors Representative Office ("NRRO"). It informed them that Electric Boat had ended "its pursuit of 'market extension' opportunities" and had decided to "focus[ ] on design and construction of nuclear submarines." (A.170-A.171, Tab 6 ¶¶ 3-4; A.175, Tab 6 at 2587.)

In its 1993 Annual Report, General Dynamics stated that Electric Boat had decided to "focus exclusively on building submarines." (A.227, Tab 3 at 6.) The Navy reviewed General Dynamics' annual reports and was well-aware of this decision. (A.533-A.534, Tab 13 at 68-69; A.581-A.582, Tab 18 at 45-47.) Newspapers contained articles about it. (A.215-A.217; A.231, Tab 12; A.245, R.126, Ex. D.) Moreover, the Navy was keenly aware of what was taking place at Electric Boat's facilities, including its decision to discontinue commercial work, because hundreds of Navy and other government officials are stationed at Electric Boat, interact daily with Electric Boat personnel, and have access to all areas of Electric Boat's

facilities. (A.474-A.479, A.481-A.484, Tab 16 at 14-16, 31-33, 36-39; A.580, A.583-A.584, Tab 18 at 29, 52-53; A.519-A.520, Tab 13 at 16-17.)

In the Fall of 1993, Electric Boat began to implement its decision to exit commercial work. Electric Boat disbanded its commercial business units and put its Charleston, South Carolina assets relating to LNG spheres and BMPPs up for sale in an entity called Marine Energy Systems Corporation ("MESC"). (A.438, Tab 7 ¶ 4; A.440-A.442, Tab 8 ¶¶ 3, 6.) Goldman Sachs distributed a so-called "offering memorandum," as referred to by Gilliam, for the purpose of selling MESC. It was entitled "Opportunity in LNG Containment Systems Fabrication," stated that "General Dynamics is seeking a purchaser for its liquefied natural gas ('LNG') containment systems business," (A.235, R.50, Ex. 4 at 4), and referred to BMPPs as "Additional Opportunities." (A.237, R.50 Ex. 4 at 6; *see* A.233, R.50, Ex. 4 at 2.) It went on to state: "General Dynamics has elected to focus its resources on the management of its core defense businesses, and believes that MESC can be most successful in a corporation dedicated to the commercial sector." (A.237, R.50, Ex. 4 at 6.)

Thus, if the hundreds of millions of dollars of "potential revenue" from these LNG and BMPP "opportunities" referred to in the memorandum were going to be realized, they were not going to be realized by Electric Boat; rather, they might be realized by the buyer of MESC. That buyer was Gilliam. In December 1994, Gilliam's company bought MESC from General Dynamics for $12 million. (R.73 ¶ 2;

A.438, Tab 7 ¶ 4; A.451, Tab 14 at 23.)[3] Electric Boat wound down other attempts to develop commercial work by the end of 1993. All projects relating to such efforts were concluded by the end of 1994. (A.440-A.442, Tab 8 ¶¶ 3-7; A.438, Tab 7 ¶ 4.)

D. The 1995 Congressional Hearings.

In 1995, Congress held a series of hearings to address (1) appropriation of funds for the construction of the SSN-23 by Electric Boat and (2) the Navy's strategy for the procurement of the New Attack Submarine class (the Virginia class), which would succeed the Seawolf class of submarines. (A.254-A.255, Tab 5; A.246-A.247, Tab 29; A.249-A.250, Tab 30.) The Navy supported the appropriation of the funds for the construction of the SSN-23 by Electric Boat for two reasons. First, the construction of the SSN-23 by Electric Boat would preserve the nuclear submarine industrial base. Second, there was a military need for the SSN-23 in light of a new Russian threat. (A.255-A.256, A.263, A.266, A.275-A.279, Tab 5 at 104-05, 127, 130, 139-143.) With respect to preserving the industrial base, Assistant Navy Secretary Slatkin testified: "[T]his decision [to procure the SSN-23] does a number of very good things for us. It maintains two nuclear capable shipbuilders, preserving vital national resources. It also provides a submarine for the money. [It] is not just any submarine, but one whose capabilities are needed today. . . ." (A.266, Tab 5 at 130.) Ms. Slatkin made clear that the Navy and other government and independent agencies

[3] In March 1997, MESC filed for bankruptcy protection. (A.453, Tab 14 at 27.)

had done much detailed analysis, conducted numerous studies, had considered all possible alternatives, and had concluded that the SSN-23 was essential for the preservation of the submarine industrial base. (A.279-A.280, A.294, Tab 5 at 143-144, 158.)

James E. Turner, Jr., president of Electric Boat, also testified at the 1995 hearings. He stated: A "thorough assessment of market opportunities was conducted [by Electric Boat] covering submarine design and construction, overhaul and repair, and commercial business. As a result of this assessment, a decision was made to focus on continued submarine development and construction." (A.341-A.342, Tab 5 at 205-06; A.248, A.252, Tab 30.) No questions were asked of Mr. Turner at any of the hearings concerning Electric Boat's possible commercial work.

In December 1995, following the hearings, Congress voted to appropriate funds for the construction of the SSN-23 as part of the fiscal year 1996 DoD appropriation. (*See* Dep't of Def. Appropriations Act, 1996, Pub. L. No. 104-61, Tit. III, 109 Stat. 636, 645 (1995).) In June 1996, the Navy and Electric Boat entered into the contract for the production of the SSN-23. (A.408, R.126, Ex. B.) Electric Boat delivered the SSN-23 in 2004. (A.489-A.490, Tab 16 at 75-76.)

E. The Complaint and the District Court's Judgment.

On May 7, 1999, Gilliam initiated this action by filing a complaint alleging a violation of the False Claims Act. Gilliam alleged that during the "bottom up review" and during the 1995 Congressional hearings, General Dynamics provided false information to the effect that, without submarine construction orders, Electric Boat's shipbuilding

capability would not survive and the division would go out of business. (Compl. ¶¶ 5-7.) Gilliam alleged that General Dynamics failed to disclose commercial opportunities that would have sustained its workforce. (Compl. ¶ 8.) The United States declined to intervene in the suit.

On October 15, 2002, after extensive discovery and the development of a comprehensive factual record, the district court granted summary judgment in favor of General Dynamics. (A.26-A.45, R.127-129.) The court held that there was no evidence of any false statements and, in any event, the alleged false statements were not material to the government's decision to award the SSN-23 contract to Electric Boat. (*Id.*)

F. The Appeal.

On July 18, 2003, Gilliam filed a timely notice of appeal. On appeal, Gilliam similarly contended that Congress' decision to award the SSN-23 to General Dynamics without competitive bidding was "predicated on false statements." Gilliam argued that General Dynamics made statements "to the effect that if it had to compete for the SSN-23, its Electric Boat division would go out of business." Further, Gilliam contended that General Dynamics made representations to Congress about commercial prospects that were "inconsistent with other representations made to shareholders, with confidential information shared with Mr. Gilliam, and with other evidence in the record." (Appellant's Brief at 8.)

The court of appeals affirmed the district court's order granting summary judgment. (Pet.'s App. at 14.) The court of appeals held that, assuming Gilliam's theory was actionable under the False Claims Act, there was no

genuine issue of material fact on the false statement or materiality elements. (*Id.* at 15.) The court found "no evidence to support Gilliam's argument that Electric Boat told the government it would shut down if it was merely forced to submit a bid for the SSN-23." (*Id.* at 16.) The court cited Mr. Turner's testimony to Congress that "[p]remature competition will drive up costs unnecessarily and risk permanent loss of Electric Boat." The court pointed out that this statement referred only to competition for the New Attack Submarine (the Virginia class), not the SSN-23 (a Seawolf class submarine). (*Id.*) The court of appeals concluded that a factfinder "simply could not construe Turner's statement as saying anything false about competition for the SSN-23." (*Id.*)

The court of appeals also rejected Gilliam's alternative contention that Electric Boat should have disclosed that it chose not to pursue commercial opportunities. The court held that "[a]gain, there is no genuine issue of material fact on the false statement element because Electric Boat did disclose both to Congress and the Navy that it considered commercial opportunities, but had abandoned them." (*Id.*) Further, in any event, the court found no evidence that any lack of disclosure was material to the decision to sole source the SSN-23 to Electric Boat: "Assuming Electric Boat's foregone business opportunities would have been as lucrative as Gilliam claims, they at most indicate that Electric Boat could have survived as a commercial entity." (*Id.*) The government, however, was interested in maintaining nuclear shipyard capacity, and no evidence indicated that commercial opportunities would have preserved Electric Boat's capacity to build nuclear ships. "Thus Electric Boat's failure to disclose its foregone commercial opportunities could not have been material to the

decision to sole-source the SSN-23." (*Id.*) The court of appeals did not reach General Dynamics' alternative defense that, even if Mr. Turner made false statements in his congressional testimony, the statements were protected by the First Amendment and, therefore, not actionable.

Gilliam's petition for rehearing and suggestion for rehearing en banc were denied with no judge voting to grant rehearing.

REASONS FOR DENYING THE WRIT

The lower courts' decisions were based solely on factual findings and the application of those findings to well-settled law. The questions presented by Gilliam to this Court did not form the basis for any ruling of the district court or the court of appeals; they either were unnecessary to the courts' decisions and thus not reached, or they were not even presented. Accordingly, Gilliam has not and cannot demonstrate that the courts entered any decision that conflicts with the decision of another court, have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers, or have decided an important question of federal law that should be settled by this Court. *See* S. Ct. R. 10. The writ, therefore, should be denied.

I. THE FIRST AND SECOND QUESTIONS DO NOT WARRANT THIS COURT'S REVIEW.

The district court and the court of appeals concluded that there were no false statements and that the alleged false statements were immaterial. Thus, neither court considered General Dynamics' alternative defense that Mr.

Turner's testimony to Congress was not actionable because that testimony was entitled to *Noerr-Pennington* First Amendment immunity. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965). Because this constitutional issue was not implicated by the decision of either court, it is not appropriate for review by this Court.

A. Gillaim Has Not Demonstrated That There Is Any Disagreement Among Lower Federal Courts.

Gilliam states that General Dynamics "has succeeded in creating First Amendment immunity under the False Claims Act to provide 'opinion testimony' to Congress during hearings." (Pet. at 17.) He argues that certiorari should be granted to "correct" this inconsistency with the *Noerr-Pennington* line of cases. (*Id.*)

Gilliam misrepresents the decisions below. The court of appeals, as well as the district court, based its summary judgment ruling on petitioner's failure to produce evidence in support of the basic elements of his asserted claim. The elements of a False Claims Act claim include: (1) "a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 788 (4th Cir. 1999). The lower courts found no genuine issue of material fact on the first or third elements, i.e., false statement or materiality. The courts, therefore, did not need to reach – and did not reach – General Dynamics' defenses, such as whether Mr. Turner's testimony was entitled to First Amendment

protection or whether Congress' decision to appropriate the funds to construct the SSN-23 is a nonjusticiable question. The courts' opinions, therefore, cannot possibly conflict with any cases addressing *Noerr-Pennington* First Amendment immunity.

Moreover, Gilliam has not only failed to demonstrate a conflict with any other decision, he also has failed to point to any disagreement among other courts on the questions presented. Gilliam has cited no False Claims Act cases addressing an alleged misrepresentation to Congress – let alone any cases that disagree on the immunity of such testimony. In fact, although no court directly has addressed the issue, authority consistently suggests that such testimony would fall within *Noerr-Pennington* boundaries. *Cf. IGEN Int'l, Inc. v. Roche Diagnostics GMBH*, 335 F.3d 303, 310 (4th Cir. 2003) (The "Noerr-Pennington doctrine grants First Amendment immunity to those who engage in petitioning activity" and "immunizes [such] activity from collateral attack."); *Tarpley v. Keistler*, 188 F.3d 788, 794 (7th Cir. 1999) ("[P]arties may petition the government for official action favorable to their interests without fear of suit, even if the result of the petition, if granted, might harm the interests of others."); *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1059 (9th Cir. 1998) ("The Supreme Court has long recognized that for the Petition Clause to be a meaningful protection of the democratic process, citizens must be immune from some forms of liability for their efforts to persuade government officials to adopt policy or perform their functions in a certain way.").

Gilliam is asking this Court to articulate new constitutional law on a clean slate, without the benefit of the reasoning of any prior decision. There is no pressing need for the Court to consider such an extraordinary request at

this juncture. *See, e.g.*, *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-93 (1923) (dismissing writ as improvidently granted because of lack of circuit court conflict); *accord Wisconsin Elec. Co. v. Don Dumore Co.*, 282 U.S. 813, 813 (1931); *Sanchez v. Borras*, 283 U.S. 798, 798 (1931); *Keller v. Adams-Campbell Co.*, 264 U.S. 314, 319-20 (1924).

B. Gilliam Seeks to Have This Court Review and Revisit Factual Findings.

Gilliam asks this Court to declare a new constitutional rule based on a set of factual assertions that he did not prove. That is, he wants this Court to revisit the lower courts' factual findings as to whether any "false" or "misleading" testimony was offered in the first place, and, assuming this Court agrees with his assertions, make a constitutional determination that those statements are not protected speech. (Pet. at 13-17.)

For instance, challenging the court's factual determinations, Gilliam argues that "the court of appeals erroneously viewed Mr. Turner's May 1995 statements as being truthful." (Pet. at 14.) Gilliam asserts that Mr. Turner told him that General Dynamics' commercial businesses "were essential to its long term success," that Mr. Turner made inconsistent statements to the Senate, and, therefore, the statements to the Senate must have been "false and misleading." (*Id.* at 13-15.) Gilliam asks this Court then to reject General Dynamics' anticipated response that such statements are protected by the First Amendment. (*Id.* at 15.)

However, this Court does not grant a writ of certiorari to review evidence and discuss specific facts. *See Tacon v. Arizona*, 410 U.S. 351, 352 (1973) (dismissing writ of certiorari as improvidently granted where only issue

raised below was primarily factual); *see also United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). Nor does this Court issue sweeping constitutional declarations merely to relieve a particular litigant of the adverse consequences of a single lower court determination. *See Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) ("A-federal question . . . may present an intellectually interesting and solid problem. But his Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . This is especially true where the issues involved reach constitutional dimensions.").

Gilliam seeks to use General Dynamics' alternative *Noerr-Pennington* defense – a defense never reached – as a hook to gain a third opportunity to argue his "false statement" evidence. That, however, is not a basis for review by this Court.

II. GILLIAM'S THIRD QUESTION DOES NOT WARRANT THIS COURT'S REVIEW.

Gilliam's third question – whether the court of appeals' decision affirming summary judgment represents "an important conflict" with the Fourth Circuit's decision in *Newport News Shipbuilding v. General Dynamics Corp.*, 960 F.2d 386 (4th Cir. 1992), "calling for the exercise of this Court's supervisory power" – does not merit consideration by this Court. Gilliam has not demonstrated that the court of appeals decided any issue similar to that decided in *Newport News*, that he presented any such argument in either of the lower courts, or that the issue is even relevant to his asserted cause of action. Indeed,

Newport News was authored by one of the Fourth Circuit judges (Judge Niemeyer) who presided over the panel in this case and joined in its unanimous decision. Surely, Judge Niemeyer understood the *Newport News* decision that he authored.

A. The Court of Appeals' Decision Does Not Conflict with the *Newport News* Decision.

Gilliam has not demonstrated that the court of appeals' decision conflicts with the decision entered in *Newport News* – or even that *Newport News* involved similar issues. *Newport News* involved the government's procurement decision for the SSN-22 submarine; this case involves Gilliam's claims that General Dynamics made false statements to Congress. *Newport News* was a bid challenge case; this is a False Claims Act case. The two decisions did not involve overlapping – let alone conflicting – rulings.

In *Newport News*, the disappointed bidder for the SSN-22 submarine contract, Newport News, brought suit challenging the Navy's decision to award the contract to General Dynamics' Electric Boat division. The district court granted an injunction and directed the parties to resubmit bids. *Newport News*, 960 F.2d at 391. The Navy and General Dynamics appealed. On appeal, the court recognized as an initial matter that, because "awarding Navy contracts for the construction of nuclear submarines must remain the responsibility of the executive branch," the judiciary is limited to examining (1) whether the Navy complied with the law in awarding the contract and (2) whether its conduct in doing so was rational. *Id.* at 388 ("[I]t is well-established that a disappointed bidder bears

the heavy burden of establishing in court that 'the decision by the government agency either had no rational basis or involved a clear and prejudicial violation of applicable statutes or regulations.' "). The court reviewed the congressional authorization for the SSN-22 contract, as well as the Navy's solicitation and award of the contract to Electric Boat. *Id.* at 392-95. Based on the evidence presented, the court rejected the district court's findings and Newport News' contentions that the Navy failed to consider industrial mobilization in its procurement decision and violated its solicitation by making an award based only on price. To the contrary, the court found that the Navy considered the importance of industrial mobilization throughout the process of awarding the SSN-22 contract to Electric Boat, complied with congressional directives, and, in the face of shrinking appropriations, acted rationally. *Id.*

None of these issues was presented in this case. Thus, the court of appeals' decision in this case does not conflict with *Newport News*.

B. Gilliam Did Not Challenge the Government's Procurement Process in the District Court or the Court of Appeals.

Gilliam asks for review by this Court "in order to ensure uniformity in the Fourth Circuit's decisions relative to Seawolf procurement." (Pet. at 22.) Gilliam, however, failed to raise any claim below about the government's procurement process, and neither the district court nor the court of appeals considered the issue. This is fatal to Gilliam's third question. This Court will not review a question not raised or passed on by the lower courts. *Tacon v. Arizona*, 410 U.S. 351, 352 (1973) (dismissing writ of

certiorari as improvidently granted where questions presented by petitioner were not raised nor passed upon below; "We cannot decide issues raised for the first time here."); *accord United States v. Williams*, 504 U.S. 36, 41 (1992); *Husty v. United States*, 282 U.S. 694, 701-02 (1931). Thus, for this alternative reason, this question is not appropriate for review by this Court.

III. GILLIAM'S FOURTH QUESTION DOES NOT WARRANT THIS COURT'S REVIEW.

With respect to the fourth question that Gilliam presents for review, Gilliam asserts that the courts below "reject[ed] false certification liability under the False Claims Act" and that this represents an "important split of authority within the Circuits calling for the exercise of this Court's supervisory powers." (Pet. at i-ii, 29-30.) However, Gilliam never argued his false certification liability theory in either the district court or the court of appeals and, consequently, neither court considered the issue.

Thus, Gilliam's newly-asserted false certification liability theory rests on factual as well as legal assertions that the courts below did not consider or weigh. For instance, Gilliam claims that, assuming the district court and the court of appeals were correct in finding that James Turner's 1995 Senate testimony was true, General Dynamics' 1992 SEC filings "could not have complied with SEC reporting requirements." (Pet. at 26.) Gilliam asserts that General Dynamics contemplated winding up its business and distributing all of the funds to shareholders prior to the DoD decision to fund the SSN-23. He asserts that General Dynamics "would have closed down its Electric Boat Division absent approval of funding" and

"never disclosed this fact to its shareholders or to the SEC" by filing a Form 8-K. (*Id.*) According to Gilliam, this alleged securities violation breached an "affirmative covenant" in "all of [General Dynamics'] government contracts." (*Id.* at 28.) Gilliam asserts that this Court should exercise its "supervisory powers" to find false certification liability and thereby "protect the Congressional Intent of the False Claims Act." (*Id.* at 30.)

Gilliam, however, never asserted these alleged facts or presented this theory to either of the courts below. Thus, General Dynamics did not address them to demonstrate their absurdity, and neither the district court nor the court of appeals considered or made any findings about them. This Court does not sit to parse new facts, nor does it review questions presented on an insufficient record. *See Mishkin v. New York*, 383 U.S. 502, 512-13 (1966) (dismissing writ as improvidently granted where questions tendered by claim were "not presented by the record with sufficient clarity to require or justify their decision"); *Needelman v. United States*, 362 U.S. 600, 600 (1960) (dismissing writ as improvidently granted where the record did not adequately present the questions tendered).

In any event, the evidence showed that General Dynamics did not make any misrepresentations to its shareholders or to the SEC. (*See, e.g.*, A.35-A.44.) Moreover, Gilliam provides no authority for his assertion that any such misrepresentations to shareholders or the SEC would constitute a violation of the False Claims Act.

Accordingly, the writ as to Gilliam's fourth question should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied in its entirety.

Respectfully submitted,

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Supreme Court of the United States

JOHN ADI,

Petitioner,

v.

PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY OF AMERICA; DAN BROWN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE FOURTEENTH COURT OF APPEALS, TEXAS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

Did the Court of Appeals for the Fourteenth District of Texas violate Texas statutory law or the United States Constitution by affirming the summary judgment granted to Respondents in the defamation lawsuit brought by Petitioner in Texas state court?

DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent Prudential Property and Casualty Insurance Company of America respectfully submits the following disclosure statement:

LM Property and Casualty Insurance Company, formerly known as Prudential Property and Casualty Insurance Company of America, is wholly owned by Liberty Mutual Insurance Company, an indirect, wholly-owned subsidiary of Liberty Mutual Holding Company Inc., a Massachusetts mutual holding company whose equity rights are held by the policyholders of various of its subsidiary insurance companies.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Prudential Property and Casualty Insurance Company of America ("Prudential") and Dan Brown ("Brown")[1] respectfully submit that the Petition for Writ of Certiorari filed by Petitioner John Adi ("Petitioner") should be denied.

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[1] Prudential and Brown are referred to collectively as "Respondents."

INTRODUCTION

Petitioner seeks review of a December 11, 2003 decision from the Court of Appeals from the Fourteenth District of Texas ("the Fourteenth Court of Appeals"), an intermediate appellate court, that affirmed the summary judgment granted to Respondents in the defamation lawsuit brought by Petitioner in the 61st State District Court of Harris County, Texas. Petitioner does not seek review of the Texas Supreme Court's denial of his petition for review of the Fourteenth Court of Appeals' decision. Rather, Petitioner seeks review of the Fourteenth Court of Appeals' decision on constitutional grounds not asserted in his petition for review to the Texas Supreme Court; in connection with the Fourteenth Court of Appeals' interpretation of Texas laws, rules and statutes; and because he alleges the Fourteenth Court of Appeals' decision conflicts with decisions from the Fifth Circuit Court of Appeals that do not involve federal questions.

JURISDICTION

Respondents assert that this honorable Court lacks jurisdiction over the instant case, as (1) Petitioner's pleading in this Court is based in part on constitutional grounds not properly asserted in the Texas Supreme Court; (2) Petitioner improperly seeks a determination that the intermediate Texas appellate court improperly interpreted or applied a Texas statute or procedural rule; and (3) Petitioner improperly seeks a determination that the intermediate Texas appellate court's opinion conflicts with decisions issued by the Fifth Circuit Court of Appeals on matters that do not involve federal questions. For these reasons, this Court lacks jurisdiction under 28 U.S.C. § 1257(a) to consider Petitioner's petition for writ of certiorari.

STATEMENT OF THE CASE

Petitioner -- who is currently incarcerated at the Texas Department of Criminal Justice, Institutional Division -- and a Texas attorney were the subject of an investigation by the Texas Department of Insurance. (Pet. App. "A"). In this regard, at the request of the Texas Department of Insurance, Respondents issued a pretext insurance policy for use by the Texas Department of Insurance in conducting a sting operation ("the sting"). (Pet. App. "A"). Following the sting, Petitioner was arrested and convicted of "engaging in organized criminal activity," a second-degree felony. (Pet. App. "A"). He was sentenced to seventy years' imprisonment in the Texas Department of Criminal Justice, where he currently resides. (Pet. App. "A").

Petitioner sued Respondents for defamation in connection with a claims note prepared by Brown to explain to other Prudential employees the pretext policy created for the sting. (Pet. App. "A"). Brown stated in the note that Petitioner had been arrested in connection with the sting on January 29, 1998, and that he had been charged with insurance fraud, a third-degree felony. (Pet. App. "A"). Put simply, Brown misidentified the date of Petitioner's arrest and *understated* the degree of felony with which Petitioner had been charged. (Pet. App. "A").[2]

---

[2] In Texas, a third-degree felony is a lesser crime than a second-degree felony. TEX. PENAL CODE " 12.04, 12.33, 12.34.

Respondents moved for summary judgment on the grounds that the statements were substantially true, and that Petitioner had not been injured by them. (Pet. App. "A"). The trial court granted Respondents' summary judgment motion and the Fourteenth Court of Appeals affirmed. (Pet. App. "A"). Although Petitioner raised eight issues on appeal, Petitioner did not raise any constitutional arguments in the Fourteenth Court of Appeals. (Pet. App. "A"). The Fourteenth Court of Appeals affirmed the trial court's ruling and denied Petitioner's motion for rehearing. (Pet. App. "A"). Subsequently, Petitioner filed motions for rehearing and to correct the judgment, both of which the Fourteenth Court of Appeals denied. (Resp. App. "A" at attachments "B" and "C"). Petitioner filed a petition for review with the Texas Supreme Court but did not raise any constitutional arguments. (Resp. App. "A"). The Texas Supreme Court denied the petition for review. (Pet. App. "C"). Petitioner filed a motion for rehearing, which the Texas Supreme Court denied. (Pet. App. "D").[3]

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[3] Although Petitioner's motion for rehearing to the Texas Supreme Court presented a vague due-process argument, Respondents contend Petitioner waived the constitutional argument by failing to present it to the Texas Supreme Court in his petition for review.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

As a preliminary matter, this Court lacks jurisdiction over the petition for writ of certiorari. First, inasmuch as Petitioner failed to assert a constitutional argument in Texas' intermediate appellate courts or in his petition for review to the Texas Supreme Court, Petitioner's constitutional argument is not properly before this Court. Second, Petitioner improperly seeks review of a state court's interpretation of Texas statutes and rules. Third, Petitioner improperly seeks review of a Texas appellate court's decision that is devoid of any federal question. That is, the Fourteenth Court of Appeals' opinion does not address or implicate federal law, treaty or the United States Constitution.

Notwithstanding the numerous jurisdictional defects in the petition for writ of certiorari, Petitioner's substantive argument lacks any merit whatsoever, because he was not defamed, as the Texas courts properly found.

I. Misstatements in the Petition for Writ of Certiorari.

Pursuant to Supreme Court Rule 15(2), Respondents note the following misstatements in Petitioner's Petition for Writ of Certiorari.

Petitioner incorrectly states that the Fourteenth Court of Appeals' memorandum opinion affirming the summary judgment granted in Respondents' favor contained "material misstatements" of facts. On the contrary, any misstatements in the Fourteenth Court of Appeals' opinion were simply typographical errors that were not material and did not change the "substantial truth" analysis used in affirming the lower court's ruling. Moreover, any purported misstatements did not, and could not change the ultimate determination that the allegedly defamatory statement only *understated* the seriousness of the felony with which Petitioner was charged and for which he was convicted.

In addition, Petitioner incorrectly states that the Fourteenth Amendment of the United States Constitution is implicated in the instant litigation in light of the Fourteenth Court of Appeals' overruling of Petitioner's motions for rehearing and to correct the judgment.[4] This meritless assertion is nothing more than a thinly-veiled attempt to confer jurisdiction on this Court where none exists. Indeed, Petitioner fails to

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[4] As noted above, Petitioner failed to assert this (or any other) constitutional argument in his petition for review to the Texas Supreme Court.

explain how his rights were allegedly violated, other than pointing to a typographical error that had no bearing on the Court's decision.

Petitioner also incorrectly states that the Fourteenth Court of Appeals' decision conflicts with decisions from the United States Court of Appeals for the Fifth Circuit. This argument lacks merit as well, as the cases he cites are not in conflict with the Fourteenth Court of Appeals' decision. Moreover, even if the cases were in conflict – which they are not – such conflict would not create jurisdiction in this Court because the Fourteenth Court of Appeals did not address a federal law, statute, treaty or any legal principle that would give rise to a federal question. *See* Sup. Ct. R. 10(c).

II. Petitioner did not preserve his right to appeal on constitutional grounds, and the Fourteenth Court of Appeals did not deprive Petitioner of his due process rights in any event.

Petitioner complains that the Fourteenth Court of Appeals' refusal to grant his motion for rehearing or to correct the judgment violated the Fourteenth Amendment's due process clause. *See* Petition at 9. Petitioner did not raise his due process argument, however, in his motions for rehearing and to correct the judgment in the Fourteenth Court of Appeals, or in his petition for review to the Texas Supreme Court. (Resp. App. "A" and attachments "B" and "C" thereto). As such, Petitioner has waived his right to present a due process argument to this Court. *Illinois v. Gates*, 462 U.S. 213, 218 (1983) (Supreme Court cannot consider state court case unless federal question was both raised and decided in state court below). *See also Monks v. New Jersey, N.J.*, 398 U.S. 71 (1970) (Having failed to assert a constitutional argument in the lower court, petitioner was not entitled to assert his constitutional argument for the first time in his petition for writ of certiorari to United States Supreme Court); *Howell v. Mississippi*, No. 03-9560, 2005 U.S. Lexis 1371, *5 (U.S. Jan. 24, 2005) (citing cases) (same).[5]

Assuming, *arguendo* that Petitioner did preserve his right to assert a due process argument in this Court, Petitioner's petition for writ of certiorari should be denied because his due process argument is wholly without merit. Petitioner has not cited a single case

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[5] *See supra*, note 3.

construing the Constitution - or any other authority, for that matter - to support his contention that his due process rights were violated or to explain in what manner said rights were (allegedly) violated. Finally, Petitioner's argument regarding the import of a single typographical error, which he asserts gives rise to his due process argument, is belied by the remaining text of the appellate opinion of which he complains.

By way of explanation, it is undisputed that Petitioner was arrested on March 9, 1998 on charges of engaging in organized criminal activity. Bearing that in mind, Petitioner complains of a typographical error on page 7 of the Fourteenth Court of Appeals' decision, where Respondents' summary judgment evidence was discussed:

> ...The indictment showed that on January 13, *1998*, Adi was charged with engaging in organized criminal activity.... The capias showed that Adi was arrested on March 9, 1998, for the charged offense, and the judgment provided the details of his conviction and sentencing.

Pet. App. "A" at 7 (emphasis added). Although the indictment was actually dated January 13, 1999, the discrepancy is of no matter, because, *inter alia*, the date that Petitioner was *indicted* or *charged* was never the subject of the claims note or of the resulting defamation lawsuit. Pet. App. "A" at 2. Rather, the instant litigation stemmed from the reference in the claims note of the date of the *arrest* and the type of offense with which Petitioner was charged at that time. *Id.*

Indeed, as enumerated above, the sentence after the one upon which Petitioner bases his due process argument contains the correct date of arrest and refers to the charge that was actually brought against him. Pet. App. "A" at 7. The remaining text of the opinion reflects the correct dates and contains accurate explanatory information, as well. For instance, the appellate opinion explains the crux of Petitioner's claims in the second paragraph:

> In the [claims] note, Brown stated that Ai was arrested in connection with the sting operation on January 29, 1998, and charged with insurance fraud, a third-degree felony. In fact, Adi was arrested at a later date and was charged with "engaging in organized criminal activity," a second-degree felony.

Pet. App. "A" at 2. The court subsequently stated

> The claims note misstated the date of Adi's arrest and the exact offense charged, but these errors do not change the fact that Adi was arrested and, in fact, convicted of a more serious felony than described in the claims note....Consequently, the statements could not have been more damaging to Adi's reputation, in the mind of the average reader, than Adi's arrest and conviction for engaging in organized criminal activity, especially since the criminal activity - an insurance fraud

> scheme – was significant enough to the be target of a sting operation.

Pet. App. "A" at 8. Clearly, the typographical error of which Appellant complains cannot be assigned any import in light of the Court's obvious grasp of the salient issues and dates.

There is, simply put, no logical basis for the assertion that the typographical error in question resulted in an erroneous opinion or deprived Petitioner of his due process rights. Therefore, the petition for writ of certiorari should be denied.

III. The Texas Supreme Court is the ultimate authority on Texas law.

Petitioner incorrectly asserts his petition should be granted because the Fourteenth Court of Appeals "misconstrued or misapplied" section 73.005 of the Texas Civil Practice and Remedies Code and Rule 166a(c) of the Texas Rules of Civil Procedure. (*See* Petition at 7-8). Notwithstanding the appellate court's proper application of Texas' Civil Practice and Remedies Code and Rules of Civil Procedure, Petitioner has failed to state a basis for this Court to grant his petition.

The jurisdiction of the United States Supreme Court is described in Title 28 of the United States Code at chapter 81. 28 U.S.C. § 1251, *et seq.* Within chapter 81, section 1257 describes the only circumstances in which the U.S. Supreme Court has jurisdiction over litigation that originated in a state court:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the

> treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a). Petitioner does not assert the Fourteenth Court of Appeals' decision interpreted or applied section 73.005 of the Texas Civil Practice and Remedies Code or Rule 166a(c) of the Texas Rules of Civil Procedure in such a way as to be repugnant to the Constitution or any federal treaty or law. Nor does Petitioner assert that the Fourteenth Court of Appeals' decision draws into question the validity of a United States statute or treaty. Rather, Petitioner merely seeks an avenue to complain about the Texas courts' rulings on his unfounded claims, each of which was grounded in Texas law.

It is well-settled that the Texas Supreme Court is the final authority on Texas law when no federal question is implicated. *See, e.g., Harris County v. Carmax Auto Superstores Inc.*, 177 F.3d 306, 316 (5th Cir. 1999). *See also Haught v. MacEluch*, 681 F.2d 290, 296 (5th Cir. 1982), citing *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967) ("[T]he State's highest court is the best authority on its own law."). Therefore, Petitioner's (incorrect)[6] assertion that the Fourteenth Court of Appeals' opinion incorrectly applied or interpreted Texas rules and/or law is not properly before this Court, and his petition for writ of certiorari should be denied.

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[6] Respondents assert that the Fourteenth Court of Appeals properly applied the Texas law and rules in question.

IV. The Fourteenth Court of Appeals' decision does not conflict with opinions from the Fifth Circuit, but even if it did, review by this Court would not be proper.

Petitioner also urges this Court to grant his petition for writ of certiorari by asserting that the Fourteenth Court of Appeals' opinion conflicts with cases decided by the United States Court of Appeals for the Fifth Circuit ("the Fifth Circuit"). *See* Petition at 8-9. Here, again, Petitioner's assertion is incorrect but, even if it were not, this Court would not have jurisdiction under 28 U.S.C. 1257(a) to hear the instant matter on the grounds asserted.

As set forth above, a state court appellate opinion cannot be reviewed unless a federal question is implicated. That is, the opinion at issue must call into question a federal law or treaty; must involve a state law that conflicts with the United States Constitution, laws or treaties; or must affect privileges provided under federal law. 28 U.S.C. § 1257(a). There is simply no jurisdiction conferred on this Court by the mere fact that a state appellate decision conflicts with a federal appellate decision in the absence of a conflicting holding on a federal question. *Id.* *See also* SUP. C. R. 10(a).

Such is not the case at bar. On the contrary, the federal opinions Petitioner cites do not conflict with the Fourteenth Court of Appeals opinion.[7] Assuming,

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[7] For example, *Conticommodity Servs., Inc. v. Ragan*, 63 F.3d 438, 442 (5th Cir. 1995) is not applicable

to the instant case for myriad reasons. Petitioner erroneously interprets *Conticommodity* to mean that any records that reflected the date of his arrest and the crime with which he was charged were inadmissible while his conviction was on appeal. *See* Petition at 8. Petitioner is mistaken because the statements at issue in *Conticommodity* were made in the context of characterizing the defamation plaintiff as a dishonest person or criminal, and for no other reason. 63 F.3d at 441-42. Significantly, the trial court granted summary judgment because the defamation plaintiff's "criminal *conviction* eliminate[ed] any genuine issue of material fact regarding the issue of truth" as to his criminal nature. *Id.* at 442 (emphasis added). On appeal, the Fifth Circuit held the summary judgment in favor of the defamation defendants should not have been granted on the sole basis of the conviction, which was on appeal at the time (and which ultimately was reversed). *Id.* However, the Fifth Circuit affirmed the summary judgment on other grounds. *Id.*

In contrast, the allegedly defamatory statements of which Petitioner complains in the instant litigation did not pertain to his ultimate conviction (as did the allegedly defamatory statements in *Conticommodity*) but, rather, involved the *date* of his arrest and the *type* of offense with which he was charged. (Pet. App. "A"). The statements were made to explain the pretext policy created for the sting that involved Petitioner. *Id.* The fact that Petitioner's *conviction* was on appeal during his defamation litigation has no bearing on the appellate court's holding that the substantial truth of the statements regarding his arrest date and the degree

arguendo, the federal decisions did conflict in some manner with the Fourteenth Court of Appeals' opinion, such conflict would still not confer jurisdiction on this Court because the Fourteenth Court of Appeals did not address a single federal question. Accordingly, any conflict between the opinion and the Fifth Circuit cases could not possibly relate to a federal question.

Here again, on its face, Petitioner's argument fails to confer jurisdiction on this Court. *See* 28 U.S.C. § 1257(a). Moreover, Petitioner's argument is simply wrong, as the cases are not in conflict.

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of offense with which he was charged entitled Respondents to summary judgment. *Id.* In other words, the appeal of his conviction did not change the date Petitioner was arrested or the type of crime with which he was charged in response to the insurance fraud sting. As such, *Conticommodity* is wholly distinguishable and inapplicable.

In addition, Petitioner inexplicably contends the Fourteenth Court of Appeals' decision conflicts with *Cranberg v. Consumers Union of U.S., Inc.*, 756 F.2d 382 (5th Cir. 1985), but Respondents disagree. *See* Petition at 9. Indeed the *Cranberg* court noted that "Texas law holds substantial truth is a defense to a libel claim." 756 F.2d at 390 (citing cases).

V. There is no valid reason for certiorari to be granted in this case.

There is no compelling reason to grant Petitioner's petition for writ of certiorari. The decision of which Petitioner complains was not issued by a United States Court of Appeals in such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. SUP. CT. R. 10(a). The decision was not an important federal question determined by state court of last resort in such way as to conflict with the decision of another state court of last resort or with a United States Court of Appeals. SUP. CT. R. 10(b). Nor has the Fourteenth Court of Appeals (or the Texas Supreme Court, for that matter) decided an important question of federal law that has not been, but should be, settled by this Court, or decided an important federal question in a way that conflicts with relevant decisions of this Court. SUP. CT. R. 10(c).

Any suggestion to the contrary by Petitioner is without legal or factual basis.

CONCLUSION

For the foregoing reasons, Respondents Prudential Property and Casualty Insurance Company of America and Dan Brown submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

/s/ Ruth E. Piller
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No. 04 - 0395

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

JOHN ADI
PLAINTIFF - APPELLANT - PETITIONER

VS.

DAN BROWN, AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, A SUBSIDIARY OF THE PRUDENTIAL INSURANCE COMPANY OF AMERICA
DEFENDANTS - APPELLEES - RESPONDENTS

ON APPEAL FROM THE
FIRST APPELLATE DISTRICT
COURT OF APPEALS
HOUSTON, TEXAS
01-03-00063-CV

APPELLANT'S PETITION FOR REVIEW

JOHN ADI
#878039
3872 FM. 350 South
LIVINGSTON, TEXAS 77351
PETITIONER PRO SE

IDENTITY OF PARTIES AND COUNSEL

PURSUANT TO TEX. R. APP. ANN. 38.1(a) (VERNON PAMPH - 2000), THE FOLLOWING PERSONS ARE INTERESTED PARTIES:

(1) PRESIDING JUDGE AT TRIAL

HON. JOHN DONOVAN
61st DISTRICT COURT
HOUSTON, TEXAS 77002

(2) APPELLEES - RESPONDENTS

DAN BROWN, AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY. A SUBSIDIARY OF THE PRUDENTIAL INSURANCE OF AMERICA
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STATEMENT OF THE CASE

PETITIONER, JOHN ADI SUED FOR DAMAGES, RESPONDENTS, DAN BROWN, AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, A SUBSIDIARY OF THE PRUDENTIAL INSURANCE COMPANY OF AMERICA FOR DEFAMATION OF CHARACTER (SLANDER PER SE) ARISING OUT Of STATEMENTS MADE BY DAN BROWN ON JANUARY 30, 1998 CONCERNING PETITIONER TO TWO OTHER PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY EMPLOYEES. DAN

BROWN MADE THE STATEMENTS IN COURSE AND SCOPE OF HIS EMPLOYMENT AS A PRUDENTIAL EMPLOYEE.

RESPONDENTS, DAN BROWN, AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY MOVED FOR SUMMARY JUDGEMENT, WHICH HAS GRANTED BY THE TRIAL COURT ON SEPTEMBER 19, 2002 BY HON. JOHN DONOVAN OF THE 61st JUDICIAL DISTRICT COURT OF HARRIS COUNTY. PETITIONER APPEALED THE JUDGEMENT TO THE FIRST COURT OF APPEALS. THE PARTIES WAIVED ORAL ARGUMENT. APPEAL HAS SET FOR HEARING BY SUBMISSION BEFORE JUSTICES TIM TAFT, GEORGE C. HANKS, AND JANE BLAND OF THE FIRST COURT OF APPEALS.

THE FIRST COURT OF APPEALS AFFIRMED TRIAL COURTS JUDGEMENT AND FILED MEMORANDUM OPINION ISSUED ON JULY 01, 2004 BY HON. JUSTICE TIM TAFT IN CAUSE NO. 01-03-00063-CV; JOHN ADI VS. DAN BROWN AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, A SUBSIDIARY OF THE PRUDENTIAL INSURANCE COMPANY OF AMERICA SEE APPENDIX "A".

PETITIONER FILED MOTION FOR REHEARING WHICH THE FIRST COURT OF APPEALS DENIED ON AUGUST 26, 2004 SEE APPENDIX "B". PETITIONER, JOHN ADI NOW FILES THIS PETITION FOR REVIEW ASKING THIS COURT

TO REVIEW FIRST COURT OF APPEALS JUDGEMENT.

STATEMENT OF JURISDICTION

PETITIONER, JOHN ADI SEEKS REVIEW OF THE JUDGEMENT OF THE FIRST COURT OF APPEALS ISSUED ON JULY 01, 2004. APPENDIX A. THAT JUDGEMENT AS REFLECTED BY THE MEMORANDUM OPINION OF THE COURT OF APPEALS ISSUED BY JUSTICE TIM TAFT (APPENDIX A) ON JULY 01, 2004 AFFIRMED TRIAL COURTS JUDGEMENT THAT HAS ON APPEAL. THE COURT OF APPEALS IN RENDERING ITS JUDGEMENT COMPLETELY OVERLOOKED THE DATE THE STATEMENTS THAT WAS THE CENTER OF THE SUIT WAS PUBLISHED AND AFFIRMED THE TRIAL COURTS JUDGEMENT BASED ON CRIMINAL CONVICTION THAT OCCURED MORE THAN A YEAR AFTER THE PUBLICATION IN QUESTION THAT WAS ON APPEAL AT THE TIME OF BOTH TRIAL AND COURT OF APPEALS JUDGEMENT. THIS COURT HAS JURISDICTION PURSUANT TO TEXAS GOV'T CODE, SEC 22.001(a)6 TO REVIEW THE JUDGEMENT OF THE COURT OF APPEALS IN THIS CASE BECAUSE THE FIRST COURT OF APPEALS IN THE INSTANT CASE HAS COMMITTED AS ERROR OF LAW, AND THAT ERROR IS OF SUCH IMPORTANCE TO THE JURISPRUDENCE OF THE STATE THAT IT REQUIRES CORRECTION. THIS ERROR WAS NOT COMMITTED IN A CASE WITHIN THE FINAL JURISDICTION OF THE FIRST COURT OF APPEALS.

THIS COURT ALSO HAS JURISDICTION PURSUANT TO TEXAS GOV'T CODE 22.001(a)(2) BECAUSE THE FIRST COURT OF APPEALS IN THIS CASE HAS HELD DIFFERENTLY FROM PRIOR DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL ON THE SAME QUESTION OF LAW.

ADDITIONALLY THIS COURT HAS JURISDICTION TO REVIEW THIS CASE BECAUSE THE FIRST COURT OF APPEALS DECISION IN THE INSTANT CASE CONFLICTS WITH A DECISION OF THE UNITED STATES SUPREME COURT SEE MAYHEW VS. CAPRITO, 749 S.W.2d 1,2 (TEX. 1990).

ISSUES PRESENTED

(1.) WHERE A PLAINTIFF IN A CIVIL ACTION FILES A MOTION FOR LEAVE OF COURT TO FILE A RESPONSE TO A DEFENDANTS MOTION FOR SUMMARY JUDGEMENT AND THE RECORD BEFORE THE COURT OF APPEAL CONTAINS TRIAL COURTS ORDER DENYING PLAINTIFFS MOTION AND A TRIAL COURTS SUMMARY JUDGEMENT ORDER IN FAVOR OF THE DEFENDANTS THAT DID NOT INDICATE THAT THE TRIAL COURT CONSIDERED OR DID NOT CONSIDER PLAINTIFFS RESPONSE BEFORE GRANTING SUMMARY JUDGEMENT, ON APPEAL OF THE TRIAL COURTS ORDER DENYING PLAINTIFFS MOTION FOR LEAVE TO FILE RESPONSE, IS IT PROPER FOR AN APPELLATE COURT UPON FINDING THAT PLAINTIFFS MOTION HAS TIMELY FILED TO OVERRULE PLAINTIFFS APPEAL OF THE TRIAL COURTS

ORDER ON THE GROUND THAT NOTHING IN THE RECORD INDICATES THAT THE TRIAL COURT DID NOT CONSIDER PLAINTIFFS RESPONSE BEFORE GRANTING DEFENDANTS SUMMARY JUDGEMENT MOTION? DID THE FIRST COURT OF APPEALS ERR IN OVERRULING PETITIONER'S APPEAL OF TRIAL COURTS DENIAL OF HIS MOTION FOR LEAVE TO FILE RESPONSE TO RESPONDENTS MOTION FOR SUMMARY JUDGEMENT?

(2.) WHETHER THE FIRST COURT OF APPEALS PROPERLY APPLIED TEX.R. EVID. RULE 803(8), 803(22), AND 902(1)(4) WHEN IT OVERRULED PETITIONERS APPEAL CONTESTING TRIAL COURTS ADMISSIBILITY AND AUTHENTICITY OF RESPONDENT'S SUMMARY JUDGEMENT EVIDENCE EXHIBITS F AND G WHEN AFFIRMING TRIAL COURTS JUDGEMENT.

(3.) WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONERS 1999 CRIMINAL CONVICTION WHICH WAS ON APPEAL AT THE TIME OF TRIAL COURTS JUDGEMENT WAS ADMISSIBLE. UNDER TEX. R. EVID. 803(8).

(4.) WHETHER THE COURT OF APPEALS AFFIRMANCE OF TRIAL COURTS JUDGEMENT ON PETITIONERS DEFAMATION ACTION BASED ON PETITIONERS 1999 CRIMINAL CONVICTION WHICH WAS ON APPEAL AT THE TIME OF TRIAL COURTS JUDGEMENT WAS PROPER.

(5.) WHETHER UNDER TEXAS LAW, DOES A CRIMINAL CONVICTION SATISFY TRUTH INQUIRY IN A CIVIL ACTION FOR DEFAMATION.

(6.) WHETHER IN LIGHT OF THE SUMMARY JUDGEMENT EVIDENCE, THE FIRST COURT OF APPEALS ERRED IN FINDING THAT RESPONDENT WERE ENTITLED TO SUMMARY JUDGEMENT ON THE BASIS OF SUBSTANTIAL TRUTH AND THAT TRIAL COURT DID NOT ERR IN GRANTING RESPONDENTS MOTION FOR SUMMARY JUDGEMENT..

(7.) WHETHER THE FIRST COURT OF APPEALS ERRED IN OVERRULING PETITIONERS APPEAL OF TRIAL COURTS DENIAL OF PETITIONER'S OBJECTIONS AND MOTION TO STRICK RESPONDENT'S SUMMARY JUDGEMENT EXHIBITS.

(8.) WHETHER THE FIRST COURT OF APPEALS ERRED IN ITS FINDING THAT THERE ARE NO GENUINE ISSUE OF MATERIAL FACT PRECLUDING SUMMARY JUDGEMENT FOR THE DEFENDANT ON APPELLANTS DEFAMATION CASE.

(9.) WHETHER THE FIRST COURT OF APPEALS ERRED IN HOLDING THAT TRIAL COURT DID NOT ABUSE ITS DESCRETION BY DENYING ADI'S MOTION FOR NEW TRIAL.

(10.) WHETHER THE FIRST COURT OF APPEALS DENIED PETITIONER [ADI] DUE PROCESS OF LAW AND EQUAL PROTECTION LAW RIGHT GUARANTED TO HIM UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHEN IT FAILED TO CONSIDER ALL ARGUMENT RAISED BY PETITIONER IN HIS APPELLATE BRIEF, AND FAILED TO LIMIT THE OBJECTIVE TRUTH INQUIRY ON PETITIONERS DEFAMATION ACTION ON "WHETHER THE STATEMENTS WERE TRUE WHEN MADE." WHEN IT AFFIRMED TRIAL COURTS JUDGEMENT.

STATEMENT OF FACTS

THE COURT OF APPEALS CORRECTLY STATED THE NATURE OF THE CASE HOWEVER PETITIONER JOHN ADI WAS NOT THE SUBJECT OF AN INVESTIGATION AT THE TIME OF THIS INCIDENT AND THE COURT OF APPEALS FAILED TO STATE THAT BROWN MADE THE DEFAMATORY STATEMENTS IN QUESTION TO TWO OTHER INDIVIDUALS ON JANUARY 30, 1998. PETITIONER ADI OFFERS THE FOLLOWING ADDITIONAL FACTS:

RESPONDENT, DAN BROWN ON JANUARY 30, 1998 IN COURSE AND SCOPE OF HIS EMPLOYMENT WITH PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY IN HOUSTON, TEXAS MADE SLANDEROUS STATEMENTS HE ALLEGEDLY RECEIVED FROM ANOTHER INDIVIDUAL FROM AUSTIN, TEXAS CONCERNING PETITIONER TO TWO OTHER

PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY EMPLOYEES BASED IN HOUSTON AND HOLMDEL, NEW JERSEY THAT ADI HAS BEEN ARRESTED BY THE FRAUD UNIT ON JANUARY 29, 1998 AND CHARGED WITH INSURANCE FRAUD, A THIRD DEGREE FELONY. PETITIONER LATER UNCOVERED THIS SECRETLY CONCEALED ACT THROUGH DAN BROWN'S ANSWER TO INTERROGATORIES PROPOUNDED BY PETITIONER TO DAN BROWN DURING LITIGATION OF A DIFFERENT LAWSUIT. BASED ON THAT DISCOVERY PETITIONER ON JUNE 14, 2002 FILED THIS LAWSUIT AGAINST DAN BROWN AND HIS EMPLOYER PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY. (TS 2-9).

RESPONDENT ON JULY 19, 2002 BEFORE ALLOWING DISCOVERY FILED A MOTION FOR SUMMARY JUDGEMENT IN WHICH THEY ASSERTED AFFIRMATIVE DEFENSE OF SUBSTANTIAL TRUTH, RES JUDICATA, AND LACK OF INJURY. (1st SUPP. TS. 1-53). RESPONDENT'S MOTION FOR SUMMARY JUDGEMENT WAS SET FOR HEARING BY SUBMISSION BEFORE HON. JOHN DONOVAN FOR AUGUST 19, 2002.

PETITIONER FILED HIS RESPONSE AND OBJECTIONS TO RESPONDENTS MOTION FOR SUMMARY (3rd SUPP. P.31-41) ALONG WITH OTHER PLEADINGS THAT INCLUDE: AFFIDAVIT OF JOHN ADI IN OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGEMENT (3rd SUPP. P. 20-30); PLAINTIFFS WRITTEN OBJECTIONS AND MOTION TO STRIKE DEFENDANTS SUMMARY

JUDGEMENT EXHIBITS (3rd SUPP. TS. P. 10-17}; MOTION FOR LEAVE OF COURT TO FILE PLAINTIFF'S LATE RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGEMENT. (TS. 30-32).

TRIAL COURT ON SEPTEMBER 19, 2002 SIGNED SUMMARY JUDGEMENT ORDER IN FAVOR OF THE RESPONDENT'S. (TS. 36), (APPENDIX C); DENIED PETITIONER'S MOTION FOR LEAVE OF COURT TO FILE PLAINTIFFS LATE RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT (TS. 32), (APPENDIX D); DENIED PETITIONER'S WRITTEN OBJECTIONS AND MOTION TO STRIKE DEFENDANT'S SUMMARY JUDGEMENT EXHIBITS: (TS. 33). ON OCTOBER 15, 2002 PETITIONER TIMELY FILED HIS MOTION FOR NEW TRIAL (TS.38-102) WHICH THE TRIAL COURT OVERRULED ON NOVEMBER 8, 2002 (TS. 110). PETITIONER ON DECEMBER 6, 2002 APPEALED TO THE FIRST COURT OF APPEALS (TS 141).

ON APPEAL, PETITIONER RAISED NINE ISSUES: (1) WHETHER TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR LEAVE OF COURT TO FILE PLEADINGS IN RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGEMENT; (2) WHETHER TRIAL COURT ERRED IN DENYING APPELLANT'S OBJECTIONS AND MOTION TO STRIKE DEFENDANT'S SUMMARY JUDGEMENT EXHIBITS; (3) WHETHER DEFENDANT'S SUMMARY JUDGEMENT EVIDENCE WERE SUFFICIENT TO SUPPORT TRIAL COURT'S JUDGEMENT; (4) WHETHER

DEFENDANT'S WERE ENTITLED TO SUMMARY JUDGEMENT AS A MATTER OF LAW BASED ON DOCTRINE OF RES JUDICATA; (5) WHETHER DEFENDANT'S WERE ENTITLED TO SUMMARY JUDGEMENT AS A MATTER OF LAW BASED ON DEFENSE OF SUBSTANTIAL TRUTH; (6) WHETHER DEFENDANT'S WERE ENTITLED TO SUMMARY JUDGEMENT AS A MATTER OF LAW BASED ON DEFENSE OF LACK OF INJURY; (7) WHETHER TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR LEAVE OF COURT TO FILE PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION; (8) WHETHER TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL; (9) WHETHER THERE ARE GENUINE ISSUES OF MATERIAL FACT THAT PRECLUDE SUMMARY JUDGEMENT FOR THE DEFENDANT'S ON APPELLANT'S DEFAMATION CASE.

IN A MEMORANDUM OPINION FILED ON JULY 01, 2004, THE FIRST COURT OF APPEALS OVERRULED ALL PETITIONERS POINT OF ERROR ON APPEAL AND AFFIRMED TRIAL COURTS JUDGEMENT ON GROUND THAT RESPONDENT'S WERE ENTITLED TO SUMMARY JUDGEMENT ON SUBSTANTIAL TRUTH AS A MATTER OF LAW. (APPENDIX A).

UPON REVIEW OF THE COURT OF APPEALS JUDGEMENT, PETITIONER DISCOVERED THAT THE COURT OVERLOOKED THE DATE THE SLANDEROUS STATEMENT WAS MADE AND FURTHER RELIED UPON PETITIONERS 1999

CONVICTION THAT WAS ON APPEAL TO AFFIRM TRIAL COURTS JUDGEMENT.

PETITIONER FILED MOTION FOR REHEARING WHICH THE COURT OF APPEAL DENIED. {APPENDIX A). PETITIONERS PETITION FOR REVIEW IS CURRENTLY DUE IN THIS COURT NOVEMBER 12, 2004. (APPENDIX D). PETITIONER RAISED EACH AND EVERY GROUND FOR REVIEW IN THE COURT OF APPEALS. THE COURT CONSIDERED EACH GROUND ON THE MERIT, AND DECIDED THE SAME ADVERSELY TO PETITIONER.

SUMMARY OF THE ARGUMENT

(1.) THE FIRST COURT OF APPEALS INCORRECTLY AFFIRMED THE TRIAL COURT'S JUDGEMENT, HOLDING THAT THE RESPONDENTS PROVED THE SUBSTANTIAL TRUTH OF BROWN'S STATEMENT AS A MATTER OF LAW, BECAUSE THE AFFIRMANCE WHICH WAS BASED ON PETITIONERS 1999 CRIMINAL CONVICTION WHICH WAS ON APPEAL AT THE TIME OF TRIAL COURTS JUDGEMENT WAS IMPROPER.

THERE IS NO STATUTORY OR JURISPRUDENTAL BASIS FOR THE PROPOSITION THAT A CRIMINAL CONVICTION SATISFIES THE TRUTH INQUIRY IN A CIVIL PROCEEDING FOR DEFAMATION UNDER TEXAS LAW PETITIONERS 1999 CONVICTION DID NOT SATISFY TRUTH INQUIRY IN A CIVIL ACTION BY WAY OF

DEFAMATORY STATEMENTS. THE COURT OF APPEALS AFFIRMANCE OF TRIAL COURTS JUDGEMENT WITH OUT CONSIDERING ALL THE ARGUMENTS AND SETS OF MATERIAL FACTS MADE BY PETITIONER IN HIS APPELLATE BRIEF WAS IMPROPER AND DENIED PETITIONER DUE PROCESS OF LAW RIGHT UNDER THE FOURTEENTH AMENDMENT OF UNITED STATES OF AMERICA. AFFIRMANCE WAS FOR THE WRONG REASON.

(2.) THE COURT OF APPEALS ERRED IN FINDING THAT TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING RESPONDENT'S SUMMARY JUDGEMENT EVIDENCE EXHIBITS F AND G BECAUSE THESE EXHIBITS WERE IMPROPERLY CERTIFIED BY THE DISTRICT CLERK. ADDITIONALLY EXHIBIT "G" WHICH SHOWS PETITIONERS 1999 CRIMINAL CONVICTION WAS INADMISSABLE BECAUSE THE RECORD SHOW THE JUDGEMENT WAS BEING APPEALED AND NOTHING IN THE RECORD INDICATES A MANDATE WAS ISSUED ON THE JUDGEMENT.

(3.) THE COURT OF APPEALS OVERRULING OF PETITIONERS CHALLENGE TO THE TRIAL COURT'S DENIAL OF HIS MOTION FOR LEAVE TO FILE RESPONSE TO RESPONDENTS MOTION FOR SUMMARY JUDGEMENT ON GROUND THAT NOTHING IN THE RECORD INDICATES THAT THE TRIAL COURT DID NOT CONSIDER PETITIONERS RESPONSE IS IMPROPER. BECAUSE NO RULE SUGGESTS TRIAL COURT MUST STATE HE DID NOT CONSIDER SUCH RESPONSE. AN ORDER

SIGNED BY TRIAL COURT DENYING SUCH MOTION IS SUFFICIENT TO PROVE HE DID NOT.

ISSUE NUMBER ONE

WHERE A PLAINTIFF IN A CIVIL ACTION FILES A MOTION FOR LEAVE OF COURT TO FILE A RESPONSE TO A DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT AND THE RECORD BEFORE THE COURT OF APPEALS CONTAINS TRIAL COURTS ORDER DENYING PLAINTIFF'S MOTION, AND A TRIAL COURTS SUMMARY JUDGEMENT ORDER IN FAVOR OF THE DEFENDANT'S THAT DID NOT INDICATE THAT THE TRIAL COURT CONSIDERED OR DID NOT CONSIDER PLAINTIFF'S RESPONSE BEFORE GRANTING SUMMARY JUDGEMENT, ON APPEAL OF THE TRIAL COURTS ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE RESPONSE IS IT PROPER FOR AN APPELLATE COURT UPON FINDING THAT PLAINTIFF'S MOTION WAS TIMELY FILED TO OVERRULE PLAINTIFF'S APPEAL OF THE TRIAL COURTS ORDER ON THE GROUND THAT "NOTHING IN THE RECORD INDICATES THAT THE TRIAL COURT DID NOT CONSIDER PLAINTIFF'S RESPONSE BEFORE GRANTING DEFENDANT'S SUMMARY JUDGEMENT MOTION"?

DID THE FIRST COURT OF APPEALS IN THE INSTANT CASE ERR IN OVERRULING PETITIONERS APPEAL OF TRIAL COURTS DENIAL OF HIS MOTION FOR LEAVE TO FILE RESPONSE

TO RESPONDENTS MOTION FOR SUMMARY *JUDGEMENT?*

STATEMENT OF FACT

RESPONDENT FILED JOINT MOTION FOR SUMMARY JUDGEMENT IN PETITIONERS DEFAMATION LAWSUIT {1st SUPP. TS. 1) HEARING WAS SET FOR AUGUST 19, 2002. PETITIONER FILED HIS MOTION FOR LEAVE OF COURT TO FILE LATE RESPONSE AND OBJECTION TO RESPONDENTS MOTION FOR SUMMARY JUDGEMENT (TS. 30-32) ALONG WITH AFFIDAVIT OF JOHN ADI IN RESPONSE TO RESPONDENTS SUMMARY JUDGEMENT {3R SUPP. P. 20); PETITIONER'S WRITTEN OBJECTIONS AND MOTION TO STRIKE RESPONDENT'S SUMMARY JUDGEMENT EXHIBITS. (3rd SUPP. TS. P.10), AND PETITIONER RESPONSE AND OBJECTION TO RESPONDENTS MOTION FOR SUMMARY JUDGEMENT. (3rd SUPP. TS P. 31-41),

RESPONDENTS DID NOT FILE ANY OBJECTION TO PETITIONERS MOTION FOR LEAVE TO FILE RESPONSE TO THEIR MOTION FOR SUMMARY JUDGEMENT. TRIAL COURT DENIED PETITIONERS MOTION FOR LEAVE TO FILE RESPONSE TO RESPONDENT'S SUMMARY JUDGEMENT MOTION. (TS. 321; EXHIBIT D.

ON APPEAL HON. TIM TAFT JUSTICE OF THE FIRST COURT OF APPEALS IN MEMORANDUM OPINION ISSUED ON JULY 01, 2004 (EXHIBIT A) MADE A FINDING THAT PETI-

TIONERS TIMELY FILED HIS RESPONSE AND OBJECTION TO RESPONDENTS MOTION FOR SUMMARY JUDGEMENT AND THAT TRIAL COURTS DENIAL OF PETITIONERS MOTION DID NOT NULLIFY PETITIONERS RESPONSE AND FINALLY OVERRULED PETITIONER APPEAL OF TRIAL COURTS DENIAL OF PETITIONERS MOTION FOR LEAVE TO FILE RESPONSE TO RESPONDENTS SUMMARY JUDGEMENT MOTION ON THE GROUND THAT NOTHING IN THE RECORD INDICATES THAT TRIAL COURT DID NOT CONSIDER PETITIONERS RESPONSE BEFORE GRANTING RESPONDENTS SUMMARY JUDGEMENT MOTION. {EXHIBIT A P. 4-5).

REASON FOR GRANTING REVIEW

THE SUPREME COURT SHOULD GRANT A REVIEW BECAUSE THE FIRST COURT OF APPEAL HAS DECIDED AN IMPORTANT QUESTION OF STATE LAW THAT SHOULD BE, BUT HAS NOT BEEN, RESOLVED BY THE SUPREME COURT. TEX. R. APP. P. 56.1(a)(2).

FURTHER THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISION OF OTHER COURT OF APPEALS. TEX. R. APP. P. 56.1(a)(2).

ARGUMENT IN SUPPORT OF GRANTING REVIEW

A. CONFLICT WITH DECISION OF OTHER COURTS:

WHEN THE COURT OF APPEALS HELD THAT PETITIONERS RESPONSE TO RESPONDENTS MOTION FOR SUMMARY JUDGEMENT WAS TIMELY FILED, AND THAT TRIAL COURTS DENIAL OF SAID MOTION DOES NOT NULLIFY PETITIONERS RESPONSE AND LATER OVERRULED PETITIONERS APPEAL CONTESTING DENIAL OF SAID MOTION ON GROUND THAT NOTHING IN THE RECORD INDICATES THAT TRIAL COURT DID NOT CONSIDER PETITIONERS RESPONSE BEFORE GRANTING SUMMARY JUDGEMENT MOTION CONFLICTS WITH OTHER COURTS OF APPEALS DECISIONS IN THE CASE OF E. B. SMITH CO. V. UNITED FIDELITY AND GUARANTY, 850 S.W. 2d 621, 623 TEX. APP. CORPUS CHRISTI 1993 WRIT DENIED); CLENDENNEN V. WILLIAMS, 896 S.W. 2d 257 (TEX.APP. TEXARKANA 1995), AND ALSO THIS SUPREME COURTS DECISION IN THE CASE OF SIMON V. YORK CRANE AND RIGGING CO. INC., 739 S.W. 2d 795 (TEX. 1987) IN FACT IN EACH OF THOSE CASES INCLUDING THIS SUPREME COURTS CASE THE COURT HAS ALWAYS HELD THAT UNDER RULE 5 AND RULE 1665 a (c) OF TEXAS RULE OF CIVIL PROCEDURE THAT APPELLANT'S RESPONSE PLEADING WERE TIMELY FILED AS WAS HELD BY THE COURT OF APPEAL IN INSTANT CASE HOWEVER IN NONE OF THESE CASES DID THE COURT OVERRULE

APPELLANT'S APPEAL TO TRIAL COURTS DENIAL OF HIS MOTION FOR LEAVE TO FILE RESPONSE TO A DEFENDANT'S SUMMARY JUDGEMENT MOTION AFTER FINDING THAT RESPONSE WAS TIMELY FILED ON GROUND THAT "NOTHING IN THE RECORD INDICATES THAT TRIAL COURT DID NOT CONSIDER APPELLANT'S OR PETITIONERS RESPONSE BEFORE GRANTING SUMMARY JUDGEMENT MOTION.

B. IMPORTANCE OF THE QUESTION PRESENTED:

THE QUESTION PRESENTED TO THIS HONORABLE SUPREME COURT IS OF A MAGNITUDE OF STATE WIDE IMPORTANCE IN THAT THE COURT OF APPEAL IN THE INSTANT CASE HAS CREATED A NEW PRECEDENCE THAT IT IS WITHIN THE LAW TO OVERRULE A LITIGANTS APPEAL OF A TRIAL COURTS ORDER DENYING MOTION FOR LEAVE TO FILE A RESPONSE PLEADING TO MOTION FOR SUMMARY JUDGEMENT DESPITE A FINDING THAT RESPONSE HAS TIMELY ONCE NOTHING IN THE RECORD BEFORE IT DOES NOT INDICATE THAT TRIAL COURT DID NOT CONSIDER THE RESPONSE BEFORE GRANTING SUMMARY JUDGEMENT. IN VIEW OF LARGE LITIGATION WITHIN THE STATE, A GUIDANCE ON THE PART OF THE SUPREME COURT ON THIS QUESTION IS ALSO OF GREAT IMPORTANCE. THIS TYPE OF ISSUE WILL CONTINOUSLY COME UP TIME AFTER TIME IF THIS COURT ALLOWS THIS DECISION BY THE FIRST COURT OF APPEALS TO STAND

WITHOUT THE BLESSING OF THIS HONORABLE SUPREME COURT ON WHETHER THE COURT OF APPEALS DECISION IS LEGALLY RIGHT TO BECOME A LAW WITHIN THE STATE JUDICIARY SYSTEM.

PETITIONER RESPECTFULLY REQUEST THAT THIS HONORABLE SUPREME COURT GRANT REVIEW OF THIS ISSUE.

ISSUE NUMBER TWO

WHETHER THE FIRST COURT OF APPEALS PROPERLY APPLIED TEX. R. EVID. RULES 803(8), 803(22) AND 902(1)(4) WHEN IT OVERRULED PETITIONERS APPEAL CONTESTING TRIAL COURTS ADMISSIBILITY AND AUTHENTICITY OF RESPONDENTS SUMMARY JUDGEMENT EVIDENCE EXHIBITS F AND G WHEN AFFIRMING TRIAL COURTS JUDGEMENT?

STATEMENT OF FACTS

RESPONDENTS MOTION FOR SUMMARY JUDGEMENT WAS SUPPORTED BY DOCUMENTS ATTACHED TO THEIR SUMMARY JUDGEMENT MOTION AS EXHIBITS F AND G (1st SUPP. TS. 4S-S3).

EXHIBIT F CONTAINS TWO DOCUMENTS (1) COPY OF COPY OF ORIGINAL CAPIAS SHOWING PETITIONER, JOHN ADI WAS ARRESTED ON MARCH 9, 1998. (2) SECOND DOCUMENT IS A COPY OF COPY OF ORIGINAL INDICTMENT

RETURNED AGAINST PETITIONER ON JANUARY 1, 1999.

EXHIBIT G CONTAINS TWO PAGE DOCUMENT SHOWING PETITIONER WAS CONVICTED AND SENTENCED FOR THE FELONY OFFENSE OF ENGAGING IN ORGANIZED CRIMINAL ACTIVITY ON APRIL 21, 1999, THIS DOCUMENT FURTHER INDICATES THAT AS APPEAL WAS TAKEN ON THIS CONVICTION ON APRIL 21, 1999. THE BACK OF THESE DOCUMENTS BEARS A PHOTO COPY OF THE SEAL OF HARRIS COUNTY DISTRICT CLERKS AND A CERTIFICATION DATE OF "JUNE 04, 1996" PETITIONER MADE SEVERAL OBJECTIONS TO THESE RESPONDENTS EXHIBIT F AND G THAT INCLUDE WRITTEN OBJECTION AND MOTION TO STRIKE THESE EXHIBITS ON GROUND THAT THEY ARE HEARSAY, NOT ADMISSIBLE, IMPROPERLY CERTIFIED, IMPROPERLY AUTHENTICATED, NOT COMPETENT SUMMARY JUDGEMENT EVIDENCE, NOT RELEVANT TO DECIDING THE ISSUE BEFORE THE COURT, THAT ATTEMPTED CERTIFICATION IS PRODUCT OF QUESTIONABLE IRREGULARITIES BY THE HARRIS COUNTY DISTRICT CLERK AND A PRODUCT OF FRAUDULENT ACT (3rd SUPP. TS. 10-17), (3rd SUPP. (TS. 31-41). TRIAL COURT DENIED PETITIONERS OBJECTION (TS 33) AND SIGNED SUMMARY JUDGEMENT ORDER IN FAVOR OF THE RESPONDENTS (TS 36).

ON APPEAL PETITIONER IN HIS POINTS OF ERROR TWO AND THREE (APPELLANTS BRIEF P.8-20) ASSERTED THAT TRIAL COURT ERRED IN

DENYING HIS OBJECTIONS AND MOTION TO STRIKE RESPONDENTS SUMMARY JUDGEMENT EXHIBITS F AND G, AND THAT THESE EXHIBITS F AND G WERE INSUFFICIENT TO SUPPORT TRIAL COURTS JUDGEMENT. PETITIONER RE-ASSERTED SAME REASONS HE ASSERTED IN THE TRIAL COURT ON APPEAL.

THE COURT OF APPEALS IN THEIR MEMORANDUM OPINION (EXHIBIT A) WRITTEN BY JUSTICE TIM TAFT OVERRULED PETITIONERS POINT OF ERROR TWO AND THREE ON GROUND THAT THESE RESPONDENTS EXHIBITS F AND G ARE ADMISSIBLE UNDER TEX. R. EVID. 803(8), THAT UNDER TEXAS RULE OF EVIDENCE RULE 902(1) EXHIBITS F AND G ARE SELF AUTHENTICATING AND THAT CERTIFICATION BY THE DISTRICT CLERK'S OFFICE EVEN THOUGH WITH QUESTIONABLE DATE OF CERTIFICATION CONFORM WITH REQUIREMENTS OF TEX. R. EVID. 902(1)(4) BECAUSE THE RULE DOES NOT SPECIFY THAT THE CERTIFICATION CONTAIN AN ACCURATE DATE AND THERE IS NOTHING IN THE RECORD TO INDICATE THAT THE INCORRECT DATE STAMP WAS THE RESULT OF A FRAUDLENT ACT. (OPINION EXHIBIT A P. 8-9).

REASON FOR GRANTING REVIEW

THE SUPREME COURT SHOULD GRANT A REVIEW BECAUSE THE COURT OF APPEAL HAS COMMITTED AN ERROR OF LAW OF SUCH IMPORTANCE TO THE STATE'S JURISPRUDENCE

THAT IT SHOULD BE CORRECTED. TEX. R. APP. PROC. 56.1(a)(5).

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF STATE LAW THAT SHOULD BE, BUT HAS NOT BEEN RESOLVED BY THE SUPREME COURT. TEX. R. APP. PROC, 56.1(a)(6).

ADDITIONALLY THE SUPREME COURT SHOULD GRANT A REVIEW BECAUSE THIS CASE INVOLVES INTERPRETATION OF TEX. R. EVID. RULE 902(1)(4) TO DETERMINE WHETHER UNDER THIS RULE A DISTRICT CLERK'S CERTIFICATION MUST CONTAIN AN ACCURATE DATE AND WHETHER A DISTRICT CLERK'S FALSE STATEMENT REGARDING EXISTENCE OF A DOCUMENT IN HIS OFFICE IN CONNECTION WITH CERTIFICATION OF PUBLIC RECORD VOIDS THE CERTIFICATION OF THE DOCUMENT.

ARGUMENT IN SUPPORT OF GRANTING REVIEW

A. COURT OF APPEAL MISSAPPLIED/ MISINTERPRETED TEX.R. EVID. 902(1),(4), 803(8)

THE FIRST COURT OF APPEALS HELD THAT IT WAS NOT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO ADMIT EXHIBITS F AND G INTO EVIDENCE AS PUBLIC DOCUMENT EXCEPTION TO HEARSAY RULE UNDER TEX.R. EVID. 803(8), THAT DOMESTIC PUBLIC DOCUMENTS SUCH AS

EXHIBITS F AND G, ARE SELF-AUTHENTICATING UNDER TEX. R. EVID. 902(1), AND THAT DISTRICT CLERK'S CERTIFICATION OF THESE EXHIBITS CONFORM WITH THE REQUIREMENT OF TEX. R. EVID. 902(1),(4) BECAUSE THE RULE DOES NOT SPECIFY THAT THE CERTIFICATION CONTAIN AN ACCURATE DATE (OPINION EXHIBIT A P. 8), WERE BASED ON THE COURT OF APPEALS MISAPPLICATION AMD MISINTERPRETATION OF TEX. R. EVID. 803(8), 902(1),(4).

CONTRARY, RESPONDENTS SUMMARY JUDGEMENT EXHIBITS F AND G ARE COPIES OF COPIES OF ORIGINAL CERTIFIED DOCUMENTS PREPARED BY HARRIS COUNTY CLERK BEARING AT THE BACK A SIGNATURE OF A DEPUTY CLERK, STAMP OF HARRIS COUNTY DISTRICT CLERK, INCLUD NG SEAL OF THE CLERKS OFFICE AND THE DATE OF CERTIFICATION AS JUNE 4, 1996 (1st SUPP. TS. 45-53) PUPORTING TO CERTIFY DOCUMENTS THAT NEVER EXISTED UNTIL 1998 AND 1999, BUT THOSE DOCUMENTS ARE ALL COPIES.

THUS THESE DOCUMENTS ATTACHED AS EXHIBITS F AND G TO RESPONDENTS SUMMARY JUDGEMENT MOTION ARE NOT ADMISSIBLE UNDER TEX. R. EVID. 803(3) NOR SELF AUTHENTICATING UNDER RULE 902(1) OF TEX. R. EVID. RULES 803(3) AND 902(1) APPLIES ONLY TO ORIGINAL DOCUMENTS EXECUTED BY PUBLIC ENTITIES OR OFFICIALS.

FURTHER, THE PURPOSE OF RULE 902(4) OF TEXAS RULE OF EVIDENCE IS TO ALLOW FOR A CERTIFIED COPY OF THE ORIGINAL DOCUMENT TO BE TREATED AS AN ORIGINAL. HOWEVER, ONE OF THE CONDITIONS IS THAT SUCH A COPY MUST BE CERTIFIED AS CORRECT COPY OF ORIGINAL BY THE CUSTODIAN OF THE ORIGINAL RECORD OR BY ANY OTHER PERSON AUTHORIZED TO MAKE THE CERTIFICATION, BY CERTIFICATE COMPLYING WITH PARAGRAPHS (1), (2) OR (3) OF RULE 902 OF TEXAS RULE OF EVIDENCE OR COMPLYING WITH ANY STATUTE OR COURT RULE PRESCRIBED PURSUANT TO STATUTORY AUTHORITY THIS CERTIFICATION REQUIREMENT DEMAND FOR PROPER CERTIFICATION OF THE INTENDED DOCUMENTS.

HERE THE BACK OF THE DOCUMENTS INTRODUCED BY THE RESPONDENTS INTO EVIDENCE AS EXHIBITS F AND G WHICH DOES NT BEAR ORIGINAL SEAL HAS THE FOLLOWING ATTESTATION BY HARRIS COUNTY DISTRICT CLERKS OFFICE:

> "I CHARLES BACARISSE, DISTRICT CLERK OF HARRIS COUNTY, TEXAS CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF THE ORIGINAL RECORD FILED AND OR RECORDED IN MY OFFICE ELECTRONICALLY OR HARD COPY, AS IT APPEARS ON THIS DATE.

WITNESS MY OFFICIAL HAND AND SEAL OF OFFICE THIS JUNE 04, 1996"

CHARLES BACARISSE, DISTRICT CLERK
HARRIS COUNTY, TEXAS
BY (signature) _____DEPUTY"

THE COURT OF APPEALS HELD THAT THIS DISTRICT CLERK'S CERTIFICATION CONSTITUTE PROPER CERTIFICATION AND CERTIFIES THE REQUIREMENT OF TEX. R. EVID, 902(1), (4) BECAUSE THE RULE DOES NOT SPECIFY THAT THE CERTIFICATION CONTAIN AN ACCURATE DATE. CONTRARY, PETITIONER DISAGREE BECAUSE THE CIRCUMSTANCES OF PREPARATION OF THESE DOCUMENTS CAST VERY SERIOUS DOUBT ON THE DOCUMENTS TRUSTWORTHINESS AND INDICATE FRAUDLEHT ACTT.

IN FACT THE HARRIS COUNTY DISTRICT CLERK'S STATEMENT THAT THESE DOCUMENTS ARE TRUE AND CORRECT COPIES OF THE ORIGINALS FILED OR RECORDED IN HIS OFFICE AS IT APPEARS ON JUNE 4, 1996 PURPORTING TO CERTIFY DOCUMENTS THAT ORIGINALLY CAME INTO EXISTENCE BETWEEN 1998 and 1999 NOR COULD NOT HAVE BEEN FILED OR EXISTED IN HIS OFFICE ON JUNE 4, 1996 IS NOTHING MORE THAN FALSE TESTIMONY, THIS FALSE STATEMENT WILL NOT SATISFY THE CERTIFICATION REQUIREMENT OF TEX. R. EVID, 902(1),(4). THE SUPREME COURT SHOULD GRANT

REVIEW TO DECIDE WHETHER THIS TYPE OF CERTIFICATION TESTIMONY COULD SUPPORT RULE 903(1),(4) CERTIFICATION REQUIREMENT.

B. IMPORTANCE OF THE QUESTION PRESENTED:

THIS CASE PRESENTS A FUNDERMENTAL QUESTION REGARDING INTERPRETATION OF TEX. R. EVID. 803(8), 803(22) AND 902(1),(4) TO DETERMINE IF THE COURT OF APPEALS CORRECTLY APPLIED RULES 803(22), 803(8) AND 902(1),(4) OF TEX. R. EVID. IN DECIDING THIS CASE. THIS ISSUE RAISES THE FOLLOWING SUB ISSUES THAT COULD BE RESOLVED BY THIS HONORABLE SUPREME COURT UPON REVIEW.

(1) WETHER A DISTRICT CLERK'S FALSE STATEMENT REGARDING EXISTENCE OF A DOCUMENT IN HIS OFFICE IN CONNECTION WITH CERTIFICATION OF PUBLIC RECORD VOIDS THE CERTIFICATION OF THE DOCUMENT?

(2) WHETHER UNDER RULE 902(1),(4) THERE IS NO REQUIREMENT THAT DISTRICT CLERK'S CERTIFICATION CONTAIN AN ACCURATE DATE?

(3) WHETHER A COPY OF A COPY OF ORIGINAL DISTRICT CLERKS DOCUMENT IS ADMISSIBLE UNDER RULES 803(3), 803(22) AND 902(1), (4) OF TEXAS RULE OF EVIDENCE?

THE QUESTIONS PRESENTED IS OF GREAT PUBLIC IMPORTANCE TO THE STATE WIDE JUDICIAL SYSTEM THAT GUIDANCE ON THESE QUESTIONS IS OF GREAT IMPORTANCE TO ALL LITIGANTS. THE ISSUES IMPORTANCE IS ENHANCED BY THE FACT THAT THE FIRST COURT OF APPEALS HAS SERIOUSLY MISAPPLIED AND MISINTERPRETED RULES 902(1), (4), 803(8) AND IN THE PROCESS CREATED A NEW PRECEDENT THAT EVEN IF A DISTRICT CLERK MAKES A FALSE STATEMENT IN CONNECTION WITH CERTIFICATION OF A DOCUMENT, THAT SUCH FALSE STATEMENT SHOULD BE DISREGARDED UNDER RULE 902(1), (4) CERTIFICATION REQUIREMENT. THE COURT OF APPEALS STATEMENT THAT A DISTRICT CLERK'S FALSE STATEMENT REGARDING EXISTENCE OF A RECORD IN HIS OFFICE SHOULD BE OVERLOOKED BECAUSE UNDER TEX. R. EVID. 302(1),(4) THERE IS NO REQUIREMENT THE DATE BE ACCURATE IS NOT PERSUASIVE AND SOMETHING NEW THAT THAT DESERVES THE SUPREME COURTS REVIEW.

ISSUE NUMBER THREE

WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONERS 1999 CRIMINAL CONVICTION WHICH WAS ON APPEAL AT THE TIME OF TRIAL COURTS JUDGEMENT WAS ADMISSIBLE?

STATEMENT OF FACT

RESPONDENTS SUMMARY JUDGEMENT EVIDENCE INCLUDE EXHIBIT "G" REPRESENTING COPY OF PETITIONERS CONVICTION AND SENTENCE FOR THE OFFENSE OF ENGAGING IN ORGANIZED CRIMINAL ACTIVITY 1st SUPP, TS.(50-53), THE JUDGEMENT SHOWS AN APPEAL WAS TAKEN (1st SUPP, TS. 52) COURT OF APPEAL HELD IT HAS NOT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO ADMIT EXHIBIT "G" INTO EVIDENCE (EXHIBIT A P.8-9)

REASON FOR REVIEW

THE SUPREME COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS HAS COMMITTED AN ERROR OF LAW OF SUCH IMPORTANCE TO THE STATE'S JURISPONDENCE, THAT IT SHOULD BE CORRECTED, TEX. R. APP. R. 56.1(a)(5).

ARGUMENT IN SUPPORT OF GRANTING REVIEW

THE COURT OF APPEALS HELD THAT IT WAS NOT AN ERROR FOR TRIAL COURT TO ADMIT INTO EVIDENCE RESPONDENTS SUMMARY JUDGEMENT EVIDENCE EXHIBIT "G" WHICH IS RECORD OF PETITIONERS FELONY CONVICTION. HOWEVER, RULE 803(22) OF TEXAS RULE OF EVIDENCE SPECIFICALLY STATES THAT PENDENCY OF AN APPEAL ON A JUDGEMENT OF A PREVIOUS CONVICTION RENDERS SUCH INADMISSIBLE. SEE TEX. R. EVID. 803(22). THE

JUDGEMENT RECORD ADMITTED INTO EVIDENCE AS RESPONDENTS EXHIBIT "G" WAS INTENDED TO PROVE FACTS CONTAINED ON THOSE DOCUMENTS. SPECIFICALLY TO PROVE PETITIONERS CONVICTION FOR ENGAGING IN ORGANIZED CRIMINAL ACTIVITY. THE JUDGEMENT STATES THAT A NOTICE OF APPEAL WAS GIVEN (1st SUPP. TS.52) BUT DOES NOT SHOW THAT A MANDATE OF AFFIRMANCE WAS ISSUED.

A CONVICTION FROM WHICH AN APPEAL HAS BEEN TAKEN IS NOT CONSIDERED TO BE FINAL UNTIL THE CONVICTION IS AFFIRMED. RUSSELL V. STATE 790 S.W. 2d 655, 657 (TEX. CRIM. APP. 1990) THIS JUDGEMENT REPRESENTED AS EXHIBIT IS NOT ADMISSIBLE. TEX. R. EVID. 803(22).

THE DECISION OF THE COURT OF APPEAL TO ADMIT A PRIOR CONVICTION THAT IS ON APPEAL PRESENTS A FUNDAMENTAL PROBLEM WITHIN THE ENTIRE JUDICIAL SYSTEM DEALING WITH ISSUES REGARDING WHETHER A PRIOR CONVICTION THAT IS ON APPEAL IS ADMISSIBLE. THE IMPACT GOES WELL BEYOND CIVIL LITIGATIONS AND EXTENT TO CRIMINAL PROSECUTION ALL OVER THE STATE.

THIS HONORABLE SUPREME COURT SHOULD GRANT A REVIEW TO CORRECT THIS COURT OF APPEALS DECISION THAT DEPARTED FROM NORMS SET UNDER TEX. R. EVID. 803(22).

ISSUE NUMBER FOUR

WHETHER THE COURT OF APPEALS AFFIRMANCE OF TRIAL COURTS JUDGEMENT ON PETITIONERS DEFAMATION ACTION BASED ON PETITIONERS 1999 CRIMINAL CONVICTION WHICH WAS ON APPEAL AT THE TIME OF TRIAL COURTS JUDGEMENT WAS PROPER.

REASON FOR REVIEW

THE SUPREME COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS WAS COMMITTED AN ERROR OF LAW OF SUCH IMPORTANCE TO THE STATE'S JURISPRONDENCE, THAT IT SHOULD BE CORRECTED. TEX. R. APP. P. 56.1(a)(5).

ARGUMENT IN SUPPORT OF GRANTING REVIEW

PETITIONER SUED RESPONDENTS DAN BROWN AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY CONTENDING THAT HE WAS SLANDERED BY MR. BROWN WHEN HE TOLD TWO PRUDENTIAL EMPLOYEES ON JANUARY 30, 1998 THAT PETITIONER ADI HAD BEEN ARRESTED BY THE FRAUD UNIT ON JANUARY 29, 1998 AND CHARGED WITH INSURANCE FRAUD, A THIRD DEGREE FELONY. RESPONDENTS MOVED FOR SUMMARY JUDGEMENT BASED ON SUBSTANTIAL TRUTH DEFENSE, TRIAL COURT GRANTED SUMMARY JUDGEMENT (TS.) PETITIONER APPEALED TRIAL

COURTS JUDGEMENT. RESPONDENTS SUMMARY JUDGEMENT EVIDENCE SHOWED PETITIONER WAS ARRESTED ON MARCH 9, 1998 AND WAS SUBSEQUENTLY CHARGED AND CONVICTED OF ENGAGING IN ORGANIZED CRIMINAL ACTIVITY, A SECOND DEGREE FELONY, ON APRIL 21, 1999. (1st SUPP. TS. 51).

THE EVIDENCE FURTHER SHOWS THAT APPEAL WAS TAKEN ON THIS CONVICTION ON APRIL 21, 1999 (1st SUPP. TS. 52).

THE COURT OF APPEALS AFFIRMED TRIAL COURTS JUDGEMENT. (EXHIBIT "A") THROUGH THE COURTS MEMORANDUM OPINION ISSUED BY HON. JUSTICE TIM TAFT.

THE COURT OF APPEALS REASONED THROUGH JUSTICE TIM TAFT'S OPINION THAT (1) EVEN THOUGH PETITIONER WAS NOT ARRESTED NOR CHARGED WITH INSURANCE FRAUD *AS* BROWN STATED, THE SUMMARY JUDGEMENT EVIDENCE SHOWED RESPONDENT WAS CHARGED WITH AND CONVICTED OF A SECOND DEGREE FELONY OFFENSE OF ENGAGING IN ORGANIZED CRIMINAL ACTIVITY WHICH IS A MORE SERIOUS FELONY. (2) THE STATEMENT WOULD SEEM LESS DAMAGING TO AN AVERAGE LISTINER THAN THE ACTUAL TRUTH, CONSIDERING THAT BROWN CLAIMED PETITIONER WAS CHARGED WITH LESS SERIOUS OFFENSE. (3) AS A RESULT RESPONDENTS PROVED THE SUBSTANTIAL TRUTH OF BROWN'S

STATEMENT AS A MATTER OF LAW. SEE (EXHIBIT A OPINION P. 12-13).

IN SUMMARY THE BASIS EXPRESSED FOR THE JUDGEMENT BY JUSTICE TIM TAFT BOILS DOWN TO (1) PETITIONER ADI'S CRIMINAL CONVICTION SETTLED THE QUESTION OF THE TRUTH OF DAN BROWN'S ALLEGEDLY DEFAMATORY STATEMENTS IN FAVOR OF DAN BROWN AND HIS EMPLOYER PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY; (2) THEREFORE THERE IS NO LONGER A GENUINE ISSUE OF MATERIAL FACT ABOUT THE TRUTH OF THESE STATEMENTS; AND (3) THEREFORE SUMMARY JUDGEMENT IS PROPER.

CONTRARY, THERE IS NO STATUTORY OR JURISPRUDENTS BASIS FOR THE PROPOSITION THAT ADI'S 1999 CRIMINAL CONVICTION ON ENGAGING IN ORGANIZED CRIMINAL ACTIVITY SATISFIES THE TRUTH INQUIRY IN A CIVIL PROCEEDING FOR DEFAMATION REGARDING SLANDEROUS STATEMENTS MADE IN 1998.

THE INESCAPABLE FACT IS THAT THIS 1999 CRIMINAL CONVICTION WAS UNDER APPEAL AT THE TIME OF TRIAL COURTS JUDGEMENT AND APPEALS COURT AFFIRMANCE OF TRIAL COURTS JUDGEMENT. AND AS SUCH NOT EVEN ADMISSIBLE TO PROVE ANY FACT REGARDING SUCH CONVICTION. TEX. R. EVID. 808(22). PLAINLY THE COURT OF APPEALS AFFIRMED TRIAL COURTS JUDGEMENT FOR THE WRONG REASON.

THE FIRST COURT OF APPEALS AFFIRMANCE OF TRIAL COURTS JUDGEMENT ON THE BASIS OF ADI'S 1999 CRIMINAL CONVICTION WHICH WAS ON APPEAL AT THE TIME OF TRIAL COURTS JUDGEMENT WAS IMPROPER. UNDER TEXAS LAW, ADI'S CRIMINAL CONVICTION DOES NOT SATISFY TRUTH INQUIRY IN HIS CIVIL ACTION AGAINST DAN BROWN AND HIS EMPLOYER BY WAY OF DEFAMATORY STATEMENT. CONTICOMMODITY SERVICES, INC. V. RAGAN, 63 F. 3d 438, REHEARING DENIED, CERTIORARI DENIED 116 S. CT. 1318, 517 U.S. 1104, 134 L. ED. 2d 471.

IMPORTANCE OF THE QUESTION PRESENTED

THE QUESTION PRESENTED IS OF GREAT IMPORTANCE BECAUSE THE COURT OF APPEALS HAS ERRED IN AFFIRMING A TRIAL COURT'S JUDGEMENT FOR THE WRONG REASON AND FURTHER IMPROPERLY AFFIRMED A TRIAL COURTS JUDGEMENT BASED ON A CONVICTION WHICH WAS UNDER APPEAL AT THE TIME OF TRIAL COURTS JUDGEMENT, RELIED ON SAME CONVICTION WHICH WAS UNDER APPEAL TO RENDER ITS JUDGEMENT -WHEN SUCH CONVICTION UNDER APPEAL IS NOT EVEN ADMISSIBLE INTO EVIDENCE TO PROVE THAT JUDGEMENT UNDER TEX. R. EVID. 303(22). DEPARTED FROM NORM THAT OBJECTIVE TRUTH INQUIRY ON DEFAMATION CASE IS ON "WHETHER THE STATEMENTS WERE TRUE WHEN MADE" AND NOT WHAT HAPPENS AFTER THE DATE THE ALLEGED STATEMENTS WERE MADE.

THE ERRORS COMMITTED BY THE COURT OF APPEALS IN THE INSTANT CASE IS OF SUCH IMPORTANCE TO THE JURISPRUDENCE OF THE STATE IT REQUIRES CORRECTION.

THE DECISION OF THE COURT OF APPEALS TO AFFIRM TRIAL COURTS JUDGEMENT BASED ON PETITIONERS CRIMINAL CONVICTION WHICH HAS ON APPEAL AT THE TIME OF TRIAL COURTS JUDGEMENT HAS CREATED CONFLICTS OR INCONSISTENCIES WITHIN THE STATES COURT OF APPEAL AND CONFLICTS WITH RULINGS OF FEDERAL COURTS, PARTICULARLY THE FIFTH CIRCUIT COURT OF APPEAL IN THE CASE OF CONTICOMMODITY SERVICES, INC. V. RAGAN, 63 F. 3d 438 (5th CIR. 1995).

THE SUPREME COURT SHOULD GRANT A REVIEW IN THIS CASE TO CORRECT ERROR COMMITTED BY THE COURT OF APPEALS IN THIS CASE.

ISSUE NUMBER SIX

WHETHER IN LIGHT OF THE SUMMARY JUDGEMENT EVIDENCE, THE FIRST COURT OF APPEALS ERRED IN FINDING THAT RESPONDENTS WERE ENTITLED TO SUMMARY JUDGEMENT ON THE BASIS OF SUBSTANTIAL TRUTH AND THAT TRIAL COURT DID NOT ERR IN GRANTING RESPONDENTS MOTION FOR SUMMARY JUDGEMENT?

REASON FOR REVIEW

THE SUPREME COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS IN THE INSTANT CASE HAS COMMITTED AN ERROR OF LAW OF SUCH IMPORTANCE TO THE STATE'S JURISPONDENCE, THAT IT SHOULD BE CORRECTED TEX. R. APP. P. 56.1(a)(5).

THE COURT SHOULD ALSO GRANT REVIEW BECAUSE THE COURT OF APPEALS IN DECIDING THIS CASE HAS MISAPPLIED OR DECIDED THIS CASE AGAINST THE MANDATE OF TEXAS STATUTE TEX. CIV. PRAC. AND REM. CODE ANN, §73.005.

THE COURT SHOULD ALSO GRANT REVIEW BECAUSE THE COURT OF APPEALS HAS MISINTERPRETED AND MISAPPLIED THE HOLDING OF THIS SUPREME COURT IN THE CASE 0F McKLAIN V. JACOBS, 794 S.W.2D 14 (TEX. 1990) AD COMPLETELY IGNORED STANDARD SET IN RANDALL'S FOOD MARKET INC. V. JOHNSON, 891 S.W. 2d 640 (TEX. 1995) THAT SHOULD HAVE APPLIED IN THIS CASE.

ARGUMENT IN SUPPORT OF GRANTING REVIEW

PETITIONERS LAWSUIT WAS THAT RESPONDENT DAN BROWN ORALLY TOLD TWO PRUDENTIAL EMPLOYEES THAT PETITIONER ADI HAD BEEN ARRESTED BY THE FRAUD UNIT ON JANUARY 29, 1998 AND CHARGED WITH

INSURANCE FRAUD, A THIRD DEGREE FELONY, (TS. 2-9). IN ESSENSE PETITIONER MADE A CASE-FOR SLANDER PER SE DEFAMATION ACTION. RESPONDENTS MOVED FOR SUMMARY JUDGEMENT ON AFFIRMATIVE DEFENSE OF SUBSTANTIAL TRUTH OF THE ALLEGED STATEMENTS.

RESPONDENTS SUMMARY JUDGEMENT DID NOT PRODUCE ANY EVIDENCE THAT PETITIONER WAS ARRESTED JANUARY 29, 1998 NOR ANY EVIDENCE SHOWING PETITIONER WAS CHARGED WITH INSURANCE FRAUD IN EXISTENCE OF THE JANUARY 30, 1998 THE DATE THE ALLEGED STATEMENTS WERE MADE BY DAN BROWN TO TWO OTHER PRUDENTIAL EMPLOYEES RATHER PRODUCED EVIDENCE SHOWING PETITIONER WAS ARRESTED MARCH 9, 1998 AND CHARGED WITH ENGAGING IN ORGANIZED CRIMINAL ACTIVITY. (1st SUPP. TS. 50-53). TRIAL COURT GRANTED SUMMARY JUDGEMENT (TS. 36)

ON APPEAL FIRST COURT OF APPEALS AFFIRMED TRIAL COURTS JUDGEMENT BASED ON RESPONDENTS AFFIRMATIVE DEFENSE OF SUBSTANTIAL GROUND THAT EVIDENCE OF PETITIONERS APRIL 21, 1999 CONVICTION FOR THE FELONY OFFENSE OF ENGAGING IN ORGANIZED CRIMINAL ACTIVITY ENTITLED RESPONDENTS TO SUMMARY JUDGEMENT BECAUSE IT IS MORE DAMAGING TO PETITIONER IN THE MIND OF AVERAGE LISTENER THAN THE ACTUAL STATEMENT MADE BY MR. BROWN. IN

OTHER WORDS THAT THE STATEMENT MADE BY BROWN WAS LESS DAMAGING TO PETITIONER, ADI IN THE MIND OF AVERAGE RECEPIENT THAN THE SUMMARY JUDGEMENT OF PETITIONERS APRIL 21, 1999 CONVICTION FOR ENGAGING IN ORGANIZED CRIMINAL ACTIVITY UNDER THE STANDARD SET IN MELLVAIN V. JACOBS, 794 S.W. 3d 14 (TEX. 1990). EXHIBIT "A" OPINION P. 12-13).

THE PROBLEM WITH THIS TYPE OF DECISION IS THAT IT WENT AGAINST THE MANDATE OF TEXAS STATUTE §73.005 THAT MANDATES THAT TRUTH IS AN AFFIRMATIVE DEFENSE TO A DEFAMATION CLAIM. UNDER THIS THE OBJECTIVE TRUTH INQUIRY ON THIS DEFAMATION CASE SHOULD BE ON WHETHER THIS ALLEGED STATEMENT WERE TRUE ON JANUARY 30, 1998 THE DATE THAT THE STATEMENTS WAS MADE. WHEN THE COURT OF APPEALS RELIED ON PETITIONERS 1999 CONVICTION OR SET OF FACTS THAT OCCURED AFTER JANUARY 30, 1998 TO DECIDE THIS CASE IT CROSSED THE LINE AHD RENDERED JUDGEMENT FOR THE WRONG REASON. IN FACT BY DOING SO THE COURT OF APPEALS DENIED PETITIONER DUE PROCESS AND EQUAL PROTECTION OF LAW GAURANTED UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION. US. CONST. AMEN. XIV. AFTER ALL PETITIONER ARGUED THAT THESE STATEMENTS WERE NOT TRUE OR SUBSTANTIAL TRUE ON JANUARY 29 OR 30 1998.

THE COURT OF APPEALS COMPLETELY MISSINTERPRETED/MISAPPLIED THIS COURTS DECISION IN MELLVAIN V. JACOBS, 794 S.W. 2d 14 (TEX. 1990) IN MELLVAIN A STATEMENT IS NOT SUBSTANTIALLY TRUE IF IN THE MIND OF THE AVERAGE RECIPIENT, IT IS MORE DAMAGING TO THE PLAINTIFF'S REPUTATION THAN A TRUTHFUL STATEMENT WOULD BE. ID. THIS COURT IS MELLVAIN DID NOT STATE THAT THE SUBSTANTIAL TRUTH TEST ANALYSIS SHOULD CONSIDER SET OF FACTS BEYOND THE DATE THE ALLEGED DEFAMATORY STATEMENTS WERE MADE.

ADDITIONALLY THIS COURT IN THE CASE OF RANDALL'S FOOD MARKET INC. V. JOHNSON, 891 S.W. 2d 540 (TEX. 1995) STATES THAT IN A CASE BROUGHT BY PRIVATE INDIVIDUAL THAT LITERAL TRUTH OF THE ALLEGED STATEMENT IS A COMPLETE DEFENSE TO SLANDER .

IN THIS CASE PETITIONER MADE A CASE FOR SLANDER PER SE ACTION, AND THE RESPONDENTS SUMMARY JUDGEMENT DID NOT PRODUCE ANY EVIDENCE TO SUPPORT LITERAL TRUTH OF THE ALLEGED DEFAMATORY STATEMENT HADE BY DAN BROWN ON JANUARY 30, 1998. UNDER THAT STANDARD TRIAL COURT JUDGEMENT AND AFFIRMANCE OF TRIAL COURTS JUDGEMENT IN THIS CASE WAS IMPROPER.

THIS CASE PRESENTS QUESTIONS OF THE INTERPRETATION OF THIS COURTS DECISIONS IN MELLVAIN V. JACOBS, 794 S.W. 2d 14 (TEX. 1990).

TO SEE IF THE COURT OF APPEALS CORRECTLY APPLIED THE STANDARD SET BY THIS SUPREME COURT IN THAT CASE IN THIS INSTANT CASE.

THIS QUESTION PRESENTED CALL UPON THE SUPREME COURT TO GRANT A REVIEW IN THIS CASE TO SEE IF THE COURT OF APPEALS IN THE INSTANT CASE CORRECTLY APPLIED OR FOLLOWED THE MANDATE OF THE TEXAS STATUTE TEX. CIV. PRAC. AND REM. CODE §73.005 IN THIS CASE AND TO DECIDE WHETHER THE STANDARD SET UP IN THE CASE OF RANDALL'S FOOD MARKET INC. V. JOHNSON, 891 S.W. 2d 640 (TEX. 1995) SHOULD HAVE BEEN APPLIED IN DECIDING THIS CASE.

ADDITIONALLY TO DECIDE WHETHER PETITIONER'S WAS DENIED DUE PROCESS OF LAW RIGHT UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHEN THE COURT OF APPEALS FAILED TO CONSIDER ALL THE ARGUMENT MADE IN PETITIONERS BRIEF AND AFFIRMED TRIAL COURTS JUDGEMENT FOR THE WRONG REASON.

THE QUESTION PRESENTED IS OF GREAT IMPORTANCE TO THE STATES JURISPONDENCE THAT IT REQUIRES THIS COURTS REVIEW AND GUIDANCE ON THE QUESTIONS.

PRAYER

WHEREFORE, FOR ALL THE FOREGOING REASONS, PETITIONER JOHN ADI PRAYS THAT THIS HONORABLE SUPREME COURT GRANT A REVIEW IN THIS CASE.

RESPECTFULLY SUBMITTED,

_____

JOHN ADI, 878039
3872 FM. 350 SOUTH
LIVINGSTON, TEXAS 77351
PETITIONER PRO SE.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THE FOREGOING PETITION FOR REVIEW HAS BEEN SERVED THROUGH U.S. MAIL FIRST CLASS PRE-PAID POSTAGE TO TROY A. WILLIAMS, 400 TWO ALLEN CENTER, 1200 SMITH ST. HOUSTON, TEXAS 77002 ON NOVEMBER 12, 2004.

_____

JOHN ADI
PETITIONER PRO SE.

APPENDIX TO PETITION FOR REVIEW

EXHIBITS:

A. MEMORANDUM OPINION DATED JULY 1, 2004. JOHN ADI V. DAN BROWN AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY. CAUSE NO. 01-03-00067-04 AND JUDGMENT OF THE COURT.

B. TRIAL COURT JUDGMENT IN CAUSE NUMBER 2002-30420 DATED SEPTEMBER 19, 2002 GRANTING SUMMARY JUDGMENT

C. COURT OF APPEALS ORDER DENYING MOTION FOR REHEARING IN CAUSE NUMBER 01-03-00067-04 DATED AUGUST 26, 2004

D. MOTION FOR LEAVE OF COURT TO FILE RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND TRIAL COURT ORDER DENYING SAID MOTION DATED SEPTEMBER 19, 2002

E. SUPREME COURTS ORDER GRANTING OF TIME TIL NOVEMBER 12, 2004 IN CAUSE NO. 04-0895 DATED OCTOBER 11, 2004

EXHIBIT A

Opinion issued July 1, 2004

In The
Court of Appeals
For The
First District of Texas

NO. 01-03-00063-CV

JOHN ADI, Appellant

V.

PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, A SUBSIDIARY OF THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, AND DAN BROWN, Appellees

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On Appeal from the 61st District Court
Harris County, Texas Trial Court Cause No. 2002-30420

MEMORANDUM OPINION

On June 14,2002, appellant, John Adi, sued appellees, Prudential Property and Casualty Insurance Company, a subsidiary of the Prudential Insurance Company of America (Prudential), and Dan Brown, for defamation of character arising out of statements made by Brown. Brown made the statements, within the scope of his employment as a Prudential agent, to two other Prudential employees. The trial court granted summary judgment in favor of appellees, dismissing Adi's defamation claim. We determine whether the trial court erred by (1) denying Adi's motions for leave of court (a) to file late pleadings and (b) to file his first amended petition; (2) denying Adi's objections to and motion to strike appellees' summary judgment evidence; (3) granting appellees' motion for summary judgment on the basis of res judicata, substantial truth, or lack of injury; and (4) denying Adi's motion for new trial. We affirm.

Background

While Adi was the president and administrator of Bethsaida Medical Services, Inc. (Bethsaida), he and another individual were the subjects of an investigation by the Texas Department of Insurance (TDI). At TDI's request, Prudential issued a pretext insurance policy as part of a sting operation to uncover insurance fraud. In connection with the sting operation, Kelley Liesman, a TDI employee, telephoned Brown and made the

allegedly defamatory statements.[1] Brown allegedly repeated the statements to two other Prudential employees. As a result of the sting operation, Adi was arrested, convicted, and sentenced to 70 years in prison, which sentence he is currently serving.

Appellees moved for summary judgment on Adi's defamation claim on July 19, 2002, on the basis of res judicata, substantial truth, and lack of injury. The trial court granted appellees' summary judgment motion on September 19,2002. It is from that order that Adi now appeals.

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[1] Adi asserts that Liesman told Brown that "[a]gents were sent to Bethsaida ... where very minimal treatments were given that were in fact unneeded." Adialso claims that Liesman stated that "[o]n 1-29-98, attorney Reginald Ike, his office staff, and the administrator of the medical clinic were arrested by the fraud unit and are being charged with insurance fraud, a third degree felony." In a prior lawsuit, Adi sued Prudential and Brown for defamation based on a claims note that Brown had written containing virtually the same statements about Adi's arrest. *See Adi v. Prudential Prop. & Cas. Ins. Co.*, No. 14-01-01001-CV (Tex. App.—Houston [14th Dist.] Dec. 11, 2003, pet. denied).

Motions for Leave to File Documents

A. Request for Leave to File a Late Response and Objections

In his first point of error, Adi contends that the trial court erred by denying his motion for leave to file his late response and objections to appellees' motion for summary judgment.

Although Adi argues that the trial court erred in denying his motion for leave to file a response and objections late, he asserted in his motion that it was being filed merely "should there be any delay in getting these documents on time to the court even though they were file[d] . . . more than seve[n] days before the hearing." On appeal, Adi claims that his response and objections were in fact timely, implying, as his motion for leave expressly stated, that his motion for leave had been filed merely out of an abundance of caution.

It is uncontroverted that Adi's response and objections reflect a postmark of August 12, 2002 and that the district clerk filed them on August 15, 2002. The summary judgment hearing was set for August 19, 2002. A non movant must file his response to a motion for summary judgment not later than seven days prior to the day of hearing. TEX. R. CIV. P. 166a(c). Because Adi mailed his response and objections before the last day that he was required to do so and because they were received by the clerk's office not later than 10 days after the due date, he timely filed his response and objections. *See* TEX. R. CIV. P. 5, 166a(c); *see also E.B. Smith Co. v. United States Fid. & Guar. Co.*, 850 S.W.2d 621, 622-23 (Tex. App.—Corpus Christi 1993, writ

denied) (applying Texas Rule of Civil Procedure 5 to summary judgment response).

Because Adi did not file his response late, his motion for leave to file a late response was unnecessary, and the trial court's denial of Adi's motion did not nullify his response. Furthermore, nothing in the record indicates that the trial court did not consider Adi's response prior to granting appellees' summary judgment motion. Accordingly, we hold that the trial court did not err by denying Adi's motion for leave to file a late response and objections.

We overrule Adi's first point of error.

B. Request for Leave to File First Amended Original Petition

In his seventh point of error, Adi asserts that the trial court erred in denying his motion for leave to file his first amended original petition.

Texas Rule of Civil Procedure 63 allows a party to amend his pleadings.[2] TEX. R. Civ. P. 63; *see Goswami v.*

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[2] Rule 63 states:

> Parties may amend their pleadings ... and file such other pleas as they may desire by filing such pleas with the clerk at such time as not to operate as a surprise to the opposite party; provided, that any pleadings ... offered for filing within seven days of the date of trial or thereafter, or after such time as may be ordered by the judge under Rule 166,

Metro. Sav. & Loan Ass 'n, 751 S. W.2d 487,490 (Tex. 1988) (asserting that rule 63 applies to summary judgments). Adi filed his motion for leave to file an amended petition on August 1, 2002. The record shows that his amended petition was also filed with the trial court on the same date.[3] The summary judgment hearing was set for August 19, 2002. Because there was no court order asserting that amendments had to be filed before August 1, and because the hearing was more than seven days away, it was not necessary for Adi to request leave to file his amended pleading. *See* TEX. R. CIV. P. 63. However, there is also no indication in the record that the trial court denied Adi's motion for leave to file an amended petition.[4]

The amended pleading is part of the record, and there is no basis on which to conclude that the trial court did not consider Adi's amended pleading. Under

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> shall be filed only after leave of the judge is obtained, which leave shall be granted by the judge unless there is a showing that such filing will operate as a surprise to the opposite party.

TEX. R. Civ. P. 63.

[3] Adi's amended petition was virtually identical to his original petition.

[4] Adi appears to indicate in his brief that the trial court overruled his motion bygranting appellees' summary judgment motion, but the summary judgmentorder does not discuss whether the trial court considered Adi's motion oramended pleading.

these circumstances, leave of court to file the pleading, although unnecessary in this case, is presumed. *See Goswami*, 751 S.W.2d at 490.

We overrule Adi's seventh point of error.

Summary Judgment Evidence

In Adi's second and third points of error, he argues that the evidence supporting appellees' summary judgment motion is incompetent and, thus, that the trial court erred by denying his motion to strike such evidence and by granting summary judgment.

The admission and exclusion of evidence is committed to the trial court's
sound discretion. *City of Brownsville* v. *Alvarado*, 897 S.W.2d 750,753 (Tex. 1995). A trial court abuses its discretion when it acts without regard for any guiding rules or principles. *Downer* v. *Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). To obtain reversal of a judgment based on error in the admission or exclusion of evidence, an appellant must show that the trial court's ruling was in error and that the error was calculated to cause, and probably did cause, the rendition of an improper judgment. TEX. R. APP. P. 44.1(a)(l); *Alvarado*, 897 S.W.2d at 753.

Adi asserts that appellees' exhibits F and G attached to their motion for summary judgment were not competent proof because they were irrelevant, hearsay, and improperly certified. Exhibit F was a copy of a capias and indictment relating to Adi's arrest for

engaging in organized criminal activity and identifying his prior conviction for the felony offenses of "False Statement in Acquisition of Firearms, Dealing in Firearms without a license, and False Statement to a Grand Jury." Exhibit G was a copy of the judgment finding Adi guilty of engaging in organized criminal activity and sentencing him to 70 years in prison.

Adi argues first that exhibits F and G were not competent summary judgment proof because they were improperly certified. It is uncontroverted that both of these exhibits bore the stamp of the Harris County District Clerk's office, including the official seal of the clerk's office and the signature of a deputy clerk. However, both documents also included a date stamp indicating the date of certification as June 4, 1996. Because these exhibits were all created more than a year after the date stamped on the certification, Adi argues that the certification was void. We disagree.

The exhibits in question were public records. *See Stephens v. Dolcefino*, 126 S.W.3d 120, 137-38 (Tex. App.—Houston [1st Dist.] 2003, pet. filed) (recognizing that indictment relied on in another case constituted public record). As such, they were generally admissible as an exception to the hearsay rule. *See* TEX. R. EVID. 803(8). Under Texas Rule of Evidence 902, domestic public documents, such as exhibits F and G, are self-authenticating.[5] *See* TEX. R. EVID. 902(1). The

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[5] Texas Rule of Evidence 902 states:

Extrinsic evidence of authenticity as a condition precedentto admissibility is not required with respect to thefollowing:

certification of the copies of these exhibits was sealed and contained the signature of a deputy clerk from the Harris County District Clerk's office, as required by the Texas Rules of Evidence. *See* TEX. R. EVID. 902(1), (4). The rales do not specify that the certification contain an accurate date, and there is nothing in the record to indicate that the incorrect date stamp was the result of a fraudulent act. Consequently, it was not an abuse of discretion for the trial court to admit exhibits F and G under the public documents exception to the hearsay rule.

Adi next asserts that exhibits F and G were not competent summary judgment evidence because they were too remote in time to have had any relevance to the allegedly defamatory statements. However, these documents were relevant to appellees' defense of substantial truth of the allegedly defamatory statements. The fact that they were created months after the allegedly defamatory statements were made does not render them irrelevant, as they addressed the substantial truth of those statements. Consequently, the trial court did not abuse its discretion in admitting exhibits F and G as evidence.

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(1) Domestic Public Documents Under Seal. Adocument bearing a seal purporting to be that of the UnitedStates, or of any State, district, Commonwealth, territory . . . or of a political subdivision, department, officer, oragency thereof, and a signature purporting to be anattestation or execution.

TEX. R. EVID. 902(1).

Because we conclude that exhibits F and G are the only documents that were necessary to support appellees' motion for summary judgment based on the affirmative defense of substantial truth, we need not address the trial court's rulings on the admissibility of the other exhibits of which Adi complains. *See Aharado*, 897 S.W.2d at 753 (asserting that successful challenge to evidentiary rulings usually requires complaining party to show that judgment turns on particular evidence excluded or admitted).

Accordingly, we overrule Adi's second and third points of error.

Substantive Claims

In Adi's fourth, fifth, sixth, and ninth points of error, he claims that the trial court erred in granting summary judgment based on the defenses of substantial truth, res judicata, and lack of injury.

Appellees moved for traditional summary judgment under Texas Rule of Civil Procedure 166a(c). *See* TEX. R. CIV. P. 166a(c). A defendant is entitled to summary judgment under this rule if the evidence disproves as a matter of law at least one element of each of the plaintiff's causes of action or if the defendant conclusively establishes all elements of an affirmative defense. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995).

In reviewing the granting of a motion for summary judgment, we consider as true all the

evidence that favors the non movant. *Watts v. Hermann Hosp.*, 962 S.W.2d 102, 104 (Tex. App.—Houston [1st Dist.] 1997, no pet.). We indulge every reasonable inference in favor of the non movant and resolve all reasonable doubts in its favor. *Cont'l Casing Corp. v. Samedan Oil Corp.*, 751 S.W.2d 499, 501 (Tex. 1988); *Watts*, 962 S.W.2d at 104. When, as here, an order granting summary judgment does not specify the grounds upon which the trial court ruled, we must affirm to the extent that any of the summary judgment grounds is meritorious. *See Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471,473 (Tex. 1995).

To maintain a defamation cause of action, the plaintiff must prove that the defendant (1) published a false statement about the plaintiff, (2) that statement was defamatory, and (3) that the defendant made the statement while acting with either actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private individual, regarding the truth of the statement. *SeeAssoc.. Press v. Cook*, 17 S.W.3d 447, 452 (Tex. App.—Houston [1st

Dist] 2000, no pet). A showing of substantial truth, however, will defeat a defamation claim. *See McIlvain v. Jacobs,* 794 S.W.2d 14, 15-16 (Tex. 1990). Because substantial truth is an affirmative defense, a defendant must conclusively establish each element to be entitled to summary judgment. *See Cathey,* 900 S.W.2d at 341. To determine substantial truth, we consider whether the defamatory statement is more damaging to the plaintiff in the mind of the average listener than a true statement would have been. *McIlvain,* 794 S.W.2d at 16; *Barbouti* v. *Hearst Corp.,* 927 S.W.2d 37, 65 (Tex. App.—Houston [1st Dist.] 1996, writ denied). This evaluation involves looking at the "gist" of the statements. *Cook,* 17 S.W.3d at 452. If the underlying facts as to the gist of the libelous charge are undisputed, then we disregard any variance with respect to items of secondary

importance and determine substantial truth as a matter of law. McIlvain, 794 S.W.2d at 16; Cook, 17 S.W.3d at 452.

Adi contends that there are material issues of fact concerning whether (1) he was arrested on January 29, 1998, (2) he was charged with insurance fraud, and (3) Brown's statements were substantially true. After talking to TDI employee Liesman, Brown told two Prudential employees that Adi had been arrested by the fraud unit on January 29, 1998 and that Adi was being charged with insurance fraud, a third-degree felony. Appellees' summary judgment evidence showed that Adi was arrested in March of 1998 and subsequently charged with, and convicted of, engaging in organized criminal activity, a second-degree felony.

Adi asserts that the statements made by Brown were false, and would be more damaging to Adi's reputation in the mind of the average recipient than a truthful statement of "no such arrest, and no such charged filed on [Adi] on January 29, 1998." Although Brown's statements were not absolutely accurate, the summary judgment evidence showed that, several weeks after Brown's statements, Adi was arrested in connection with activities stemming from the insurance-fraud sting operation. Even though Adi was not charged with insurance fraud, as Brown stated, the summary judgment evidence showed that Adi was charged with and convicted of a more serious felony. As Adi acknowledges in his brief, the allegedly

defamatory statement need not be literally true; rather substantial truth is sufficient. *See ABC, Inc. v. Shanks,* 1 S.W.3d 230, 235 (Tex. App.—Corpus Christi 1999, pet. denied). The gist of Brown's statements was that Adi was charged with a felony in connection with the insurance-fraud sting operation. If anything, the statements would seem less damaging to an average listener than the actual truth, considering that Brown claimed that Adi was charged with a less serious offense. Moreover, the fact that Adi was actually arrested in March and not in January is of secondary importance to the gist of the statements and thus can be disregarded. *See Cook,* 17 S.W.3d at 452. As a result, appellees proved the substantial truth of Brown's statements as a matter of law.

Because we have determined that appellees were entitled to summary judgment on the basis of substantial truth, we need not address the merits of appellees' other bases for summary judgment. Accordingly, the trial court did not err in granting appellees' motion for summaryjudgment. We overrule Adi's fourth, fifth, sixth, and ninth points of error.

Motion for New Trial

In his eighth point of error, Adi contends that the trial court eiTed by denying his motion for new trial. A trial court has broad discretion to deny or to grant a mofion for new trial, and the trial court's discretion will not be disturbed on appeal absent a showing of a manifest abuse of that discretion. *Batra* v. *Clark,* 110 S.W.3d 126, 128 (Tex. App.—Houston [1st Dist] 2003, no pet.).

Adi's contentions in his motion for new trial merely reiterate the arguments that Adi has presented in his appellate brief, namely, that the trial court erred by denying various motions, by admitting appellees' exhibits, and by granting summary judgment. We have affirmed the trial court's summary judgment. Accordingly, the trial court did not abuse its discretion by denying Adi's motion for new trial.

We overrule Adi's eighth point of error.

Conclusion

We affirm the judgment of the trial court. All pending motions are denied as moot.

/s/ Tim Taft

Justice

Panel consists of Justices Taft, Hanks, and Bland.

Court of Appeals
First District of Texas

JUDGMENT

JOHN ADI, APPELLANT

NO. 01-03-00063-CV V.

PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, A SUBSIDIARY OF THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, AND DAN BROWN, APPELLEES

Appeal from the 61st District Court of Harris County, Texas. (Tr. Ct. No. 2002-30420)

Panel consists of Justices Taft, Hanks, and Bland. Opinion delivered by Justice Taft

The cause heard today by the Court is an appeal from the order signed by the court below on September 19, 2002. After submitting the cause and inspecting the record of the court below, it is the opinion of this Court that there was no reversible error in the judgment. It is, therefore, **CONSIDERED, ADJUDGED,** and **ORDERED** that the judgment of the court below be, in all things, **affirmed.**

It is further **ORDERED** that this decision be certified below for observance.

Judgment rendered by panel consisting of Justices Taft, Hanks, and Bland.

Judgment rendered July 1, 2004.

EXHIBIT B

NO. 2002-30420

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS

JOHN ADI

v.

DAN BROWN AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY

61st JUDICIAL DISTRICT

SUMMARY JUDGMENT ORDER

On this day, came on to be heard the Motion for Summary judgment of Defendants DAN BROWN AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY. The Court, after reviewing the pleadings and considering the evidence presented is of the opinion and finds that the above named Defendants are entitled to Summary Judgment as to Plaintiff JOHN ADI's claims as follows:

It is ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff JOHN ADI's causes of action against Defendants DAN BROWN AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY are DISMISSED (with prejudicial costs of Court to be paid by Plaintiff. Any and all relief not specifically granted herein is denied).

/s/_____

JUDGE PRESIDING

EXHIBIT C

Court of Appeals
First District
1307 San Jacinto Street, 10th Floor
Houston, Texas 77002-7006

SHERRY RADACK
CHIEF JUSTICE

TIM TAFT
SAM NUCHIA
TERRY JENNINGS
EVELYN KEYES
ELSA ALCALA
GEORGE C. HANKS, JR.
LAURA CARTER HIGLEY
JANE BLAND
JUSTICES

MARGIE THOMPSON
CLERK

JANET MCVEA WILLIAMS
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August 26, 2004

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RE: Court of Appeals Number: 01-03-0063-CV
Trial Court Case Number: 0230420

Style: John Adi
v.
Dan Brown & Prudential Ins. Co. of America, et al

The Court today, **DENIED** the appellant's *pro se* motion for rehearing with suggestion of rehearing en banc in the above referenced case.

Respectfully yours,
Margie Thompson, Clerk

/s/ Michelle Meuhlen
Michelle Meuhlen, Deputy Clerk

EXHIBIT D

CAUSE NO. 2002-30420

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS

61st JUDICIAL DISTRICT

JOHN ADI

v.

DAN BROWN, AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, A SUBSIDIARY OF THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

MOTION FOR LEAVE OF COURT TO FILE PLAINTIFFS LATE RESPONSE & OBJECTIONS TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW JOHN ADI, PLAINTIFF IN THE ABOVE STYLED AND NUMBERED CAUSE MOVES FOR LEAVE OF COURT TO FILE PLAINTIFF'S LATE OBJECTIONS AND RESPONSE TO THE DEFENDANTS MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT THEREOFF WOULD SHOW THE COURT AS FOLLOWS

I

PLAINTIFF JOHN ADI HAS ON AUGUST 10, 2002 FILED THROUGH THE U.S. MAIL FIRST CLASS CERTIFIED MAIL # 7001 2510 0009 1640 2442

- PLAINTIFFS OBJECTIONS AND RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT
- AFFIDAVIT OF JOHN ADI IN OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT
- PLAINTIFFS WRITTEN OBJECTIONS AND MOTION TO STRIKE DEFENDANTS SUMMARY JUDGMENT EXHIBITS
- PROPOSED ORDER DENYING DEFENDANTS MOTION FOR SUMMARY JUDGMENT EXHIBITS

II

PLAINTIFF REQUEST THIS LEAVE OF COURT TO FILE THESE DOCUMENTS SHOULD THERE BE ANY DELAY IN GETTING THESE DOCUMENTS ON TIME TO THE COURT EVEN THOUGH THEY WERE FILED TODAY AUGUST 10, 2002 THROUG THE MAIL WHICH IS MORE THAN SEVE DAYS BEFORE THE SCHEDULED HEARING SET FOR AUGUST 19, 2002.

WHEREFORE, PREMISES CONSIDERED, PLAINTIFF JOHN ADI, RESPECTFULLY PRAYS THAT THIS MOTION FOR LEAVE OF COURT TO FILE LATE RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT.

RESPECTFULLY SUBMITTED,

/s/ John Adi
JOHN ADI, PLAINTIFF, PRO Se

CERTIFICATE OF SERVICE

I CERTIFY THAT A TRUE AND CORRECT COPY OF THE FOREGOING MOTION FOR LEAVE OF COURT TO FILE PLAINTIFFS LATE RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT HAS BEEN FORWARDED TO ALL COUNSEL OF RECORD BY U.S. MAIL FIRST CLASS PRE PAID POSTAGE ON 10TH DAY OF AUGUST 2002.

/s/ John Adi
JOHN ADI, PRO Se

CAUSE NO. 2002-30420

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 61st JUDICIAL DISTRICT

JOHN ADI

v.

DAN BROWN, AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, A SUBSIDIARY OF THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

ORDER DENYING PLAINTIFFS WRITTEN OBJECTIONS AND MOTION TO STRIKE DEFENDANTS SUMMARY JUDGMENT EXHIBITS

ON THIS DAY, CAME TO BE HEARD PLAINTIFFS WRITTEN OBJECTIONS AND MOTION TO **STRIKE** DEFENDANTS SUMMARY JUDGMENT EXHIBITS. THE COURT, AFTER REVIEWING THE PLEADINGS AND CONSIDERING THE EVIDENCE PRESENTED IS OF THE OPINION AND FINDS THAT PLAINTIFFS WRITTEN OBJECTIONS AND MOTION TO STRIKE DEFENDANTS EXHIBITS (A-G) IS DENIED.

IT IS ORDERED, ADJUDGED AND DECREED BY THE COURT THAT PLAINTIFFS OBJECTIONS AND MOTION TO STRIKE IS DENIED.

DATE: SEPTEMBER 19, 2002

_/s/_____
JUDGE PRESIDING

VERIFICATION

I JOHN ADI TDCJ# 878039 BEING PRESENTLY INCARCERATED IN GARRA WEST UNIT OF TEXAS DEPARTMENT OF CRIMINAL JUSTICE INSTITUTIONAL DIVISION IN BEE COUNTY, TEXAS VERIFY AND DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED ON THIS THE 10TH DAY OF AUGUST, 2002.

/s/ John Adi

_____

JOHN ADI TDCJ 878039

ORDER

ON THIS THE _____ DAY OF ____, 2002, CAME TO BE HEARD PLAINTIFFS MOTION FOR LEAVE OF COURT TO FILE LATE RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT AND THE COURT HAVING CONSIDERED THE SAME IS OF THE OPINION THAT SAID MOTION SHOULD BE IN ALL THINGS DENIED.

SIGNED SEPTEMBER 19, 2002

_____

JUDGE PRESIDING

EXHIBIT E

THE SUPREME COURT OF TEXAS

Post Office Box 12248
Austin, Texas 78711
(512) 463-1312

October 11, 2004

Mr. John Adi
T.C.D.J. # 878039
3872 FM. 350 South
Livingston, TX 77351

Mr. Troy Allen Williams
Hays McConn Rice & Pickering
1200 Smith Street, Suite 400
Houston, TX 77002

RE: Case Number: 04-0895
Court of Appeals Number: 01-03-00063-CV

Style: JOHN ADI
v.
DAN BROWN, AND PRUDENTIAL PROPERTY AND CASIALTY INSURANCE COMPANY OF AMERICA

Dear Mr. John Adi:

Today the Supreme Court of Texas granted the motion for extension of time to file petition for review under the TEX. R. APP. P. 53.7(f) in the above-referenced case. The petition for review is due to be filed no later that 3:00 p.m., **November 12, 2004.**

Sincerely,
/s/ Andrew Weber
Andrew Weber, Clerk

By Nancy J. Vega, Chief Deputy Clerk
Cc: Ms. Margie Thompson

JOHN ADI
878039
3872 FM 350 SOUTH
LIVINGSTON, TX 77351

November 12, 2002

MR ANDREW WEBER
CLERK OF THE COURT
SUPREME COURT OF TEXAS
P.O. BOX 12248
AUSTIN, TEXAS 78711

RE: CASE NUMBER: 04-0895
COURT OF APPEALS NUMBER: 01-03-0063-04
TRIAL COURT NUMBER: 2002-30420

STYLE: JOHN ADI V. DAN BROWN AND PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY OF AMERICA.

DEAR MR WEBER:

ENCLOSED HEREWITH FOR FILING IN THE ABOVE REFERENCED CAUSE IS ORIGINAL COPY OF MR ADI'S PETITION FOR REVIEW. PLEASE FILE IT AND PRESENT IT TO THE COURT.

THANKS FOR YOUR ASSISTANCE IN THIS MATTER.

SINCERELY,
/s/ John Adi

JOHN ADI
PETITIONER PRO Se

(2)

No. 04-789

Supreme Court, U.S
FILED
JAN 24 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

UNITED STATES OF AMERICA, ex rel. WILLIAM JEFFREY GILLIAM

Petitioners,

v.

GENERAL DYNAMICS CORPORATION

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

REPLY BRIEF OF PETITIONER

DANIEL ROBERT BARTLEY
BARTLEY LAW OFFICES
Post Office Box 686
Novato, CA 94948-0686
(415) 898 4741
Attorney for Petitioner
William Jeffrey Gilliam

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REASONS FOR GRANTING THE WRIT

General Dynamics Corporation ("GD") filed a Brief in Opposition claiming that the record below did not reach the issue of GD's assertion of a *Noerr-Pennington* First Amendment privilege for Congressional testimony. The record and decisions below show that GD's former President, James Turner, made false statements to the Senate. This Court should grant certiorari in order to address GD's continued assertion of a First Amendment right to provide "opinion" testimony to Congress.

GD claims that the court of appeals decision below and in *Newport News v. U.S.* are consistent. The Fourth Circuit's decision in its two *Seawolf* related cases establishes a standard which would support any executive agency procurement decision as being "rational."

GD claims that the issue of false certification liability under the False Claims Act was not raised below. The record and decisions below show that the issue of GD's violations of SEC rules and regulations was raised in the complaint and in the relator's motion for summary judgment.

The record and decisions below show a lack of uniformity within the circuits as well as presenting important questions of federal law. This Court should grant certiorari in order to address this lack of uniformity and in order to interpret these important federal statutes.

Contrary to GD's Brief in Opposition, a grant of certiorari will not vindicate individual rights. Certiorari will review expenditures of significant taxpayer funds and uphold the statutory scheme of ensuring the proper expenditure of taxpayer funds.

ARGUMENT

I. CONTRARY TO GD'S ASSERTIONS, BOTH THE DISTRICT COURT AND THE COURT OF APPEALS DECISIONS SUPPORT A *NOERR-PENNINGTON* FIRST AMENDMENT PRIVILEGE/EXCEPTION TO THE FALSE CLAIMS ACT

A. Under The Standards Applicable To Summary Judgment As Applied To The Decision Below, Turner Made Knowingly False Statements To The Senate

GD's Opposition Brief mischaracterizes and misrepresents Turner's Senate testimony, as well as the record below.

On page 13, GD carefully states that Turner's statements about closing Electric Boat did not apply to the *Seawolf* award. This claim is inconsistent with the transcript of Turner's Senate testimony, which is in the record below. Senator Joseph Lieberman asked Turner if it was true that Electric Boat would close unless the Senate approved awarding GD a no-bid contract for the third *Seawolf*. Turner responded affirmatively.

At page 11, GD claims that Turner was not asked questions about commercial opportunities. The transcript shows that Turner volunteered statements about GD's commercial opportunities, claiming that exploration of commercial opportunities began in "mid-1993." Turner testified "a thorough assessment of market opportunities was conducted covering submarine design and construction, overhaul and repair, and commercial business." The record below contains undisputed facts showing that GD began its assessment of market opportunities in 1991. Gilliam

testified that Turner claimed that he was ordered to abandon commercial businesses in "mid-1993;" not to thoroughly assess these opportunities. GD's Brief in Opposition disagrees with Turner's Senate testimony.

On page 3 GD claims that the Navy began its re-evaluations of submarine manufacturing plans in 1991 and on page 7 GD claims "at the same time that the Navy was re-formulating its submarine plans...Electric Boat was exploring...its commercial opportunities."

GD correctly states that the decision below found that GD's responses to the Navy in the BUR questionnaire were not false statements. In light of the appeals court's affirmation of summary judgment, Turner's Senate testimony must be viewed as false and Turner's statements to Gilliam must be viewed as true.

Turner characterized his testimony as "my perspectives on the requirements for continued production of nuclear attack submarines." Turner informed Gilliam that commercial work was essential to GD's survival as a nuclear submarine manufacturer.

GD made the same statements to the States of Rhode Island and Connecticut prior to 1993. In affirming summary judgment, the record below construes Turner's "perspectives" as untruthful.

GD continues to argue to this Court that Turner's testimony was entitled *Noerr-Pennington* First Amendment protection because Turner's Senate testimony must be construed as false.

B. There Is No *Noerr-Pennington* Immunity Under The False Claims Act

GD's Brief does not address the fact that the making of false statements to Congress violates 18 U.S.C. §§ 1001 and 1003. GD fails to address this Court's holdings in *Hubbard v. United States*, 514 U.S. 695 (1995)

holding that there is no "judicial function" exception to § 1001. GD likewise fails to address this Court's decision in *Watkins v. United States*, 354 U.S. 178 (1957) holding that the Congress has broad investigative powers to investigate fraud and waste.

C. The Decision Below Merits Review By This Court

GD's Brief in Opposition clearly shows their belief in a *Noerr-Pennington* First Amendment right to offer "opinion" testimony to Congress. The decision below is consistent with this belief.

Immunity to offer "opinion" testimony as suggested by GD would eviscerate both 18 U.S.C. §§ 1001 and 1003 as well as 31 U.S.C. §§ 3729 and 3730.

This decision represents an important question of federal laws that should be decided by this Court.

This Court should grant certiorari in order to review GD's claimed right to immunity in Congressional testimony.

II. CONTRARY TO GD'S ASSERTIONS, THE COURT OF APPEALS DECISION BELOW AND IN *NEWPORT NEWS* CONSTITUTES A REFUSAL TO APPLY JUDICIAL SCRUTINY TO ANY EXECUTIVE OR LEGISLATIVE PROCUREMENT DECISION

A. Under The Standards Applicable To Summary Judgment As Applied To The Decision Below, All Executive Procurement Decisions Are Immune From Judicial Scrutiny

GD's Brief in Opposition claims that there is no conflict between the decision below and the Fourth

Circuit's decision in *Newport News v. General Dynamics Corporation*, 960 F.2d 386 (4th Cir. 1992).

GD correctly observes that Judge Niemeyer participated in both decisions; in fact Judge Niemeyer stated (during oral argument) that the district court's decision below was consistent with the Fourth Circuit's decision in *Newport News*.

In *Newport News* the Fourth Circuit stated its agreement with the standard for review of federal procurement decisions established by the First Circuit in *Ulstein Maritime Limited v. United States*, 833 F.2d 1032 (1st Cir. 1987). The Fourth Circuit stated that a disappointed bidder faced a "heavy burden" in challenging procurement decisions.

In *Newport News* the Fourth Circuit overturned a district court decision mandating the award of the second *Seawolf* to Newport News in order to maintain two nuclear capable submarine shipbuilders. In their Brief in Opposition GD agrees that at the time of the Fourth Circuits *Newport News* decision the Navy chose to save $73 million rather than maintaining two shipyards. This 1991 decision was made at a time when the Navy was still planning on building one new submarine per year. The decision to save $73 million and not maintain two shipyards in *Newport News* was upheld as being "reluctant and rational."

Less than two years later, in 1993, the Navy's forecast of future submarine manufacturing requirements from 1993 thru 1998 was reduced from six to one. In 1993, in order to maintain two shipyards, the Navy proposed to spend in excess of $1.5 billion.

GD does not present any argument or describe evidence to refute the fact that in *Newport News* both GD and the Navy argued that the United States didn't need two submarine shipyards. The Navy avoided spending $73 million in 1991. Then, in 1995 GD and the

Navy sought to justify their mutual 1993 decision to spend over $1.5 billion to maintain two submarine shipyards to build fewer submarines.

B. The Decision Below And In *Newport News* Is Inconsistent With A "Rational Decision" Test

GD's Brief in Opposition mischaracterizes Gilliam's argument in favor of granting certiorari on the issue of the intra and inter-circuit conflicts presented by the decision below.

There is a split of authority in the circuits on the issue of whether district court have concurrent jurisdiction over pre-award contract claims. Both the First and Third Circuits have held that district courts have equity jurisdiction over pre-award contract claims. See *Ulstein Maritime v. United States*, 833 F.2d 1952 (1st Cir. 1987), *Coco Brothers v. Pierce*, 741 F.2d 675 (3rd Cir. 1984).

The Fourth and Ninth Circuits and district and bankruptcy courts in the Fifth, Tenth and Eleventh Circuits have held that district courts have no jurisdiction over pre-award contract disputes. The circuits having the more narrow view of contract review by district courts have nonetheless set aside government contracts. See *Mark Dunning Ind. v. Perry*, 890 F.Supp. 1504 (D. M.D. Ala. 1995).

The Fourth Circuit's decision in *Newport News* attempts to define the standard for setting aside government contracts as being limited to "rational review." However, the Fourth Circuits explanatory language also states that district courts reviewing procurement decisions must be "sedulous" in even considering any such review. Sedulous means persevering and constant.

By expressly stating that its decisions below and in *Newport News* were consistent, the Fourth Circuit has established a "sedulous" standard for review of procurement law and decisions. This standard will find all executive agency decisions to be "reluctant and rational."

C. The Decision Below Merits Review By This Court

The Navy officer who refused to spend $73 million to maintain two submarine shipyards, Admiral Millard Firebaugh, was subsequently hired by GD. Admiral Firebaugh provided testimony below in support of the Navy's decision to spend $1.5 billion to accomplish the same objective that was not worth $73 million to Admiral Firebaugh when he wore the uniform of the United States Navy.

This Court should grant certiorari in order to resolve the inter-circuit conflict concerning the jurisdiction of federal courts to review pre and post award contract disputes and the standards that federal courts should apply to these reviews.

III CONTRARY TO GD'S ASSERTIONS, THE DISTRICT COURT AND THE COURT OF APPEALS DECISIONS BELOW CONSTITUTE A REFUSAL TO RECOGNIZE FALSE CERTIFICATION LIABILITY UNDER THE FALSE CLAIMS ACTS

A. Under The Standards Applicable To Summary Judgment As Applied To The Decision Below, GD's 1992 Report On Form 10-K Violated SEC Disclosure Rules

GD incorrectly describes the record below regarding its 1992 SEC reports and the issue of GD's keeping "two

sets of books." GD's Brief in Opposition at page 21, states "false certification liability theory rests on factual as well as legal assertions that the courts below did not consider or weigh." This statement is incorrect.

Page 2 of Gilliam's Material Disclosure Statement provides "in addition to violating the False Claims Act...I believe that GD also violated both the SEC Laws and the Truth in Negotiating Act."

Page 4 of Gilliam's Statement of Undisputed Facts (in support of summary judgment) lists as undisputed fact 10 "GD in 1992 made statements to its shareholders and the SEC indicating that "commercial business" when added to government business was sufficient to "bridge the gap" in nuclear submarine production." On page 6, fact 20 states "the annual report (1992) said nothing about the ability to stay open being conditioned on any form of subsidy."

The decisions below affirm the truth of GD's 1992 statements and disclosures to the Navy concerning its lack of sufficient business to maintain the viability of Electric Boat without being awarded a no-bid contract for a third *Seawolf* submarine, a no-bid design contract for the first *Virginia* class submarine, and a no-bid order for the first several *Virginia* class submarines.

GD's 1992 disclosures to shareholders and the SEC were materially inconsistent with its 1992 disclosures to the Navy. Since GD's disclosures to the Navy are deemed true, its disclosures to shareholders and the SEC are false.

In both the record below and in the related bankruptcy court adversary proceedings GD has argued that while it may have committed securities fraud, it did not violate the False Claims Act.

In the summer of 1999, GD announced its intention to merge with Gulfstream Aerospace. According to the terms of the merger agreement, GD was to issue new

GD shares for all of Gulfstream's outstanding stock. Gilliam's counsel, the DOJ and the bankruptcy court discussed the issue of GD's intention to issue GD stock to Gulfstream shareholders. The bankruptcy court directed Gilliam's counsel to disclose the existence of the then-under-seal False Claims Act complaint to the SEC for review.

At the direction of the bankruptcy court, the SEC was informed of the existence of the complaint and the allegation that GD's 1992 Report on Form 10-K was inconsistent with GD's statements to the United States Navy. GD's characterization of the false certification issue as being "new" is simply untrue.

B. GD's Failure to Comply With SEC Rules Constituted A Material Breach Of Its Contracts With The Navy Leading To False Certification Liability

There is a split in the circuits regarding actual versus implied false certification liability under the False Claims Act. Both the Fourth and Fifth Circuits have stated that they might not recognize implied certification liability. A Fourth Circuit district court has stated "we need not address the validity and problems of an implied certification claim." *United States ex rel. Joslin v. Comm. Home Health*, 984 F.Supp. 374, 384-385 (D. Md. 1997).

In contrast the Fifth and DC Circuits recognize false certification liability under the FCA. *U.S. v. Southland Management*, 288 F.3d 665, 679 (5th Cir. 2002), *U.S. ex rel. Thompson v. Columbia Healthcare*, 125 F.3d 899 (5th Cir. 1997), *Ab-Tech Const. v. United States*, 31 Fed.Cl. 429 (Fed.Cl. 1994).

GD admits, in its appellees' brief below, that the Navy had the contractual right to monitor GD's compliance with SEC rules and regulations. GD's 1992

Report on Form 10-K failed to disclose the dire financial conditions that the record below deems to be true and correct.

The discrepancy between GD's actual financial condition and its statements to shareholders is clearly a violation of the SEC's disclosure rules. This violation of SEC rules and regulations would constitute a violation of the False Claims Act as a false certification.

C. The Decision Below Merits Review By This Court

The United States recently filed an *amicus curiae* brief with the Ninth Circuit expressing strong support for a broad interpretation of false certification liability under the FCA (*U.S. ex rel. Hendow & Albertson v. Univ. of Phoenix*, appeal no. 04-16247, dated January 7, 2005).

Review is warranted due to the strong support of the United States for broad false certification liability.

Granting certiorari is warranted in order to resolve the inter-circuit disagreement over false certification liability under the False Claims Act.

CONCLUSION

For all of the reasons set forth above, petitioner respectfully requests that this Court grant Certiorari.

Respectfully submitted
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